



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

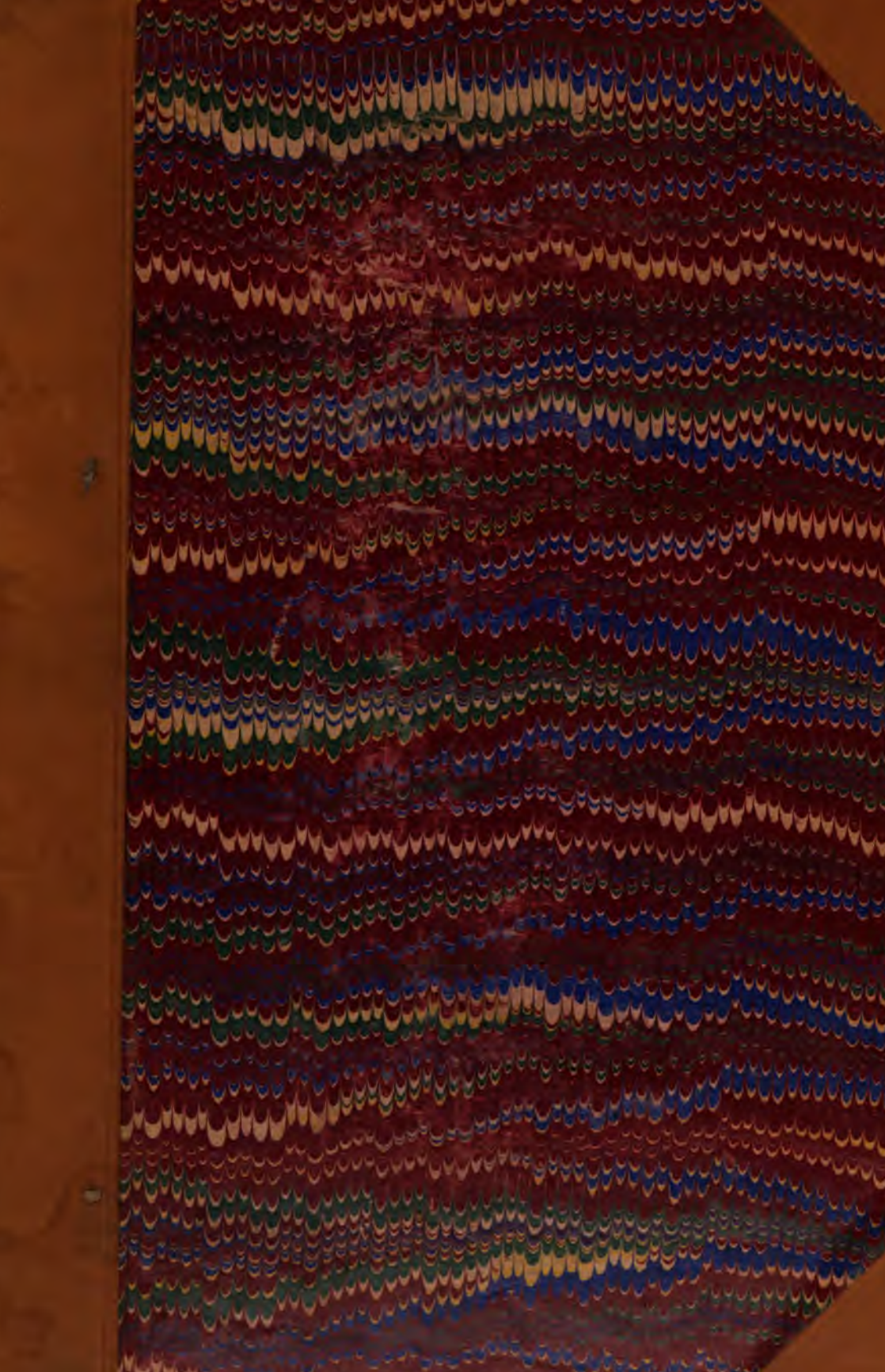
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



Complete

THE
LEGAL NEWS,

EDITED

BY

JAMES KIRBY, D.C.L., LL.D.,

Advocate.

VOL. VI.

MONTREAL :
THE GAZETTE PRINTING COMPANY
1883.

**LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.**

59.503

TABLE OF CASES

REPORTED, NOTED, AND DIGESTED

IN VOL. VI.

Adams v. Moulton.....	216	Bowman & Tripp.....	362
Agnel v. Ellis.....	216	Bradlaugh case.....	64, 205, 275
Alford v. Tiblier.....	216	Bradley v. Bradley.....	185
Allen's Appeal.....	249	Brice v. The Morton Dairy Farming & Colonization Co.....	171
Allison v. Macdougall.....	93	Brooke & Dallimore.....	4
Anders v. Hagar.....	83, 98	Brousseau v. Seybold.....	389, 394
Andrews case.....	345	Brown v. Magor.....	122
Armstrong et vir v. Trudel.....	162	Bruchesi v. Corporation of St. Gabriel....	60
Arpin v. Boy et al.....	357	Burkhard v. Travellers Insurance Co....	368
Attorney General of Ontario v. Mercer...	244	Byrd v. Corner.....	364
Ayotte & Boucher et al.....	26	Byrne v. Boadle.....	3
Bain & City of Montreal.....	138		
Baldwin v. London, Ch. & Dov. R. Co....	208	Campbell v. Bate.....	227
Bank of Toronto & Perkins.....	138	Canada Central Ry. Co. v. Murray.....	257
Banque (La) d'Hochelaga & Robertson...	307	Canada Guarantee Co. & McNichols....	305, 323
Beard & Milliken es qual.....	381	Canada Investment and Agency Co. v. Macpherson.....	136
Beattie case.....	49	Carroll v. Peters.....	216
Beauchemin v. La Corporation de la Ville de St. Jean.....	357	Carroll v. Wallace.....	216
Beaudet v. La Corporation de St. Ignace du Coteau du Lac.....	183	Catelli v. Cowper.....	202
Belanger & Baxter.....	413	Carter v. Molson.....	189
Belt case.....	201	Carter v. Molson, and Molson, oppt.....	134
Bennett v. Grand Trunk Railway Co....	271	Chamberlain v. Boyd.....	1, 320
Benoit & Brals.....	342	Champeau v. Moquin et al.....	60
Bergamini v. Bastian.....	353	Chartrand v. Corporation of the County of St. John.....	83
Bernard (Canon) case.....	280, 288	Chavigny de la Chevrotière & City of Montreal.....	348
Berthier Election case.....	74	Citizens Insurance Co. v. Warner.....	54
Bertrand v. Lalonde.....	365	Clayton v. Bell.....	411
Betty John, case of.....	352	Clemens v. Belford.....	87
Bigoness v. Drunelle.....	270	Clement & Francis.....	325
Blake & Wadleigh.....	3	Closson v. Staples.....	385
Bourdon et al v. Trudel.....	203		
Bourget & Blanchard.....	51		

College of Physicians and Surgeons v. Garon.....	61	Evans v. Hurtubise.....	336
Commissaires d'Ecoles de St. Henri v. Desmarteau et al.....	82	Everson v. Powers.....	105
Compagnie (La) d'Assurance Mutuelle, etc. v. Proteau et vir.....	85	Farmer v. Millman.....	353
Compagnie (La) d'Assurance Mutuelle v. Bastien.....	159	Fillon v. Roy.....	169, 176
Conant v. Burnham.....	15	Firms v. O'Brien.....	400
Condon, Succession of.....	216	First National Bank of Fort Scott v. Drake.	368
Conroy & Ross.....	154	Fisk & Stevens.....	329
Consolidated Bank of Canada & Merchants Bank of Canada.....	284	Fletcher v. Mutual Fire Ins. Co. of Stanstead & Sherbrooke.....	340
Consolidated Bank of Canada & Moat...171,358		Fonderie de Joliette & La Cie. d'Assurance de Stadacona.....	277
Corcoran v. Montreal Abattoir Co.....	135	Francis v. Bousquet et al.....	122
Corporation (La) du Comté d'Ottawa & La Compagnie du Chemin de Fer etc....	382	Francis et al. v. Clement es qual.....	133, 194
Corporation (The) of the County of Hochelaga v. Corporation of the Village of Cote St. Antoine.....	119	Gaudin v. Ethier (styled Doe v. Roe)....	162
Cossette v. Leduc.....	181	Garrard v. Lewis.....	62
Coughlin v. Clark.....	169, 205	Geddes v. O'Beilly et vir.....	92
Crawford et al. v. The Morton Dairy Farming & Colonization Co.....	188	Genereux et al. v. Cuthbert.....	75
Davis v. Central Vermont R. R. Co.....	44	Geoffrion v. Sénécal.....	201
Dawson & McDonald.....	155	Gervais, <i>Ex parte</i>	116
Delaume v. Agar.....	215	Giraldi & La Banque Jacques Cartier....	138
Desrosiers v. Montreal, Portland & Boston Ry. Co.....	385, 388	Godbold v. Harrison.....	216
Devala Gold Mining Co., <i>Re</i>	231	Grand Trunk Railway Co. of Canada & Brewster.....	34
Devlin v. Wilson.....	59	Grand Trunk Railway Co. of Canada & Wilson.....	138
Dickison v. Normandeau.....	129, 136	Graham et al. v. Bennett.....	298
Dion v. Chauveau et al.....	336	Grange & McLennan.....	138, 209
Dionne v. Gagnon.....	336	Grant v. Beaudry.....	25, 41, 89, 113
Doe v. Roe (read Gaudin v. Ethier)....	165	Green & Humphreys.....	320
Dominion Oil Cloth Co. & Martin.....	344	Griffith & McGovern.....	4
Dorlon & Dorion.....	325	Griffith & Rioux et al.....	211
Dotton v. Albion Common Council.....	361	Hall & Le maire etc. de Montréal.....	155
Doutre v. Regina.....	81	Hall v. McShane.....	195
Doutre & Sharpley et al.....	37	Ham, <i>Ex parte</i>	115
Dufresne v. Ross et vir.....	22	Harrington & Corse.....	138
Dugrenier v. Dugrenier.....	234	Harvie v. Farnie.....	300
Dupuy es qual. v. Bourdeau, & Bourdeau, oppt.	12	Harvey et al. & O'Shaughnessy et al....	369
East Hampton Bell Co. v. Grose.....	22	Hastings, <i>Re</i>	88
Elliott et al. & Lord et al.....	146	Hatton v. Sénécal.....	220
Equitable Life Assurance Co. & Perrault es qual.....	86	Hays v. Smith.....	216
		Hébert & Choquette.....	414
		Hébert v. La Corporation de la Paroisse de Ste. Martine.....	106
		Henault, <i>Ex parte</i>	116, 121
		Héту v. Brodeur.....	59
		Heyneman v. Davis.....	184
		Hides v. Hides.....	207

TABLE OF CASES.

V.

Hill v. State of Wisconsin.....	240	Lizotte es qual v. Descheneau.....	170
Hochelaga Mutual Fire Ins. Co. v. Lefebvre.....	236	Lochte v. Gélé.....	215
Hodgins v. Oille.....	49	Loranger & Reed.....	209
Hoffman v. The United States.....	240	Lord v. Hunter et al.....	310
Hogan, Ex parte.....	317	Lorenzen v. Woods.....	216
Hope & Co., <i>In re</i>	18	Lucas v. Piper.....	17
Houston v. Boagni.....	215	Lucke et al v. Wood.....	98
Howley v. Standard Insurance Co.....	359	Lulham v. City of Montreal.....	93
Hudon Cotton Co. & Canada Shipping Co.	138	Lureau v. De Beaufort.....	251
Hudon et al. v. Painchaud et al.....	109	Lyman es qual. v. McDiarmid.....	162
Hudon et al. v. Raincauld et al.....	107		
		Macdonald v. Dillon.....	291, 388
Ives v. Seegmiller et al.....	84	Macdonald & Whitfield.....	278
		Mackonochie case.....	265
Jacques Cartier Election.....	354	Manhattan Savings Institution v. The United States.....	240
Jasmin v. Canadian Pacific Railway Co..	163	Manhattan Medicine Co. v. Wood.....	253
		Mansfield v. Charette et al.....	106
Kelly v. Cotton.....	3	Mantha v. Seguin.....	12
Kitcat v. Sharp.....	208	Mantha et al. v. Simard et al.....	195
Knapp case.....	57	Marrioneaux v. Brugier.....	216
Kring case.....	161	Marshall v. Sims.....	216
		Martin v. City of Montreal.....	23
Labranche v. Labranche et al.....	60	McBean v. McBean et al.....	95
Lafon v. Lafon et al.....	84	McCraken et al v. Logue.....	90
La. Ice Co. v. State National Bank.....	216	McCraken & Logue.....	326
L'Ainé & Hamel.....	154	McDonald v. Lériger <i>dû</i> Laplante.....	23
Lalonde v. Archambault.....	300	McDonell v. Buntin.....	160
Lamb v. Munster.....	282	McGillivray v. Parker.....	308
Lambe es qual. v. The Ontario Bank.....	158	McGuire v. Mayor of Montreal.....	361
Lambert v. Grand Trunk Ry. Co. of Canada.	43	McKnight, <i>Re</i>	289
Lamontagne v. Stevenson.....	53	McLaren v. Caldwell.....	81
Langrish v. Archer.....	264	McLean v. The Clydesdale Banking Co..	411
Lanouette v. Tougas.....	123	McLeod v. Marcil.....	55
Lapierre & Laviolette.....	415	Mercer case.....	233
Lareau v. La Compagnie d'Imprimerie de la Minerve.....	156	Merchants Bank of Canada v. Montreal, Portland & Boston Ry. Co. & Ingram <i>mis en cause</i>	229
Lauson v. Ross et vir.....	22	Michaels v. Plimsoll.....	61
Laviosa v. Railroad.....	216	Michigan Central Railway Co. v. Myrick.	69
Lavoie v. Gaboury.....	276	Milloy v. O'Brien.....	336
Lawrence v. Ryan.....	346	Minister & Trustees of St. Andrew's Church & Board for the management of the Temporalities Fund.....	27
Leader v. Northern Railway Co.....	272	Moir's Estate.....	88
Lennox v. Thom.....	8	Molinari, <i>Ex parte</i>	395
Leonard v. Leonard.....	49	Molson & Carter.....	372
Lessard & Genet.....	154	Molson v. Chapleau.....	222
Levin v. Traham.....	242	Moncatel v. Ross.....	336
Levy v. Flash.....	216	Montreal Printing Co. v. Ives.....	328
Lighthall v. Caffrey.....	202	Montreal Telegraph Co. & Low.....	327
Lionais & La Banque Molson.....	209		
Livermore v. White.....	231		

Morin v. Berger et al.	236	Regina v. Bradlaugh.	64, 205, 275
Mousseau v. Bate.	271	" v. De Léry et al.	402
Mousseau, <i>Re</i> , Petitioner.	354	" v. Dwyer.	66
Muldon v. Rickey.	379	" v. Jones.	400
Mulholland et al. (<i>Re</i>), Insolvents & Merchants Bank of Canada, claimants.	171, 358	" v. Gough.	271
Mullaly v. People.	336	" v. Milloy <i>alias</i> Dooley.	95, 100
Munn et al. & Berger & Sons.	363	" v. O'Rourke.	86
Munster v. Lamb.	394	" v. Ratcliff.	264
		" v. Sellars.	197
		" v. Suprani.	269
Nasmith, <i>Re</i>	57	Robert, <i>Ex parte</i> & City of Montreal.	148
Nelson v. The Canadian District Telegraph Co.	184	Rochette & Ouellet.	412
Newton v. Oruse.	107	Roots v. Snelling.	231
Nixon v. Darling.	160	Ross et al. v. Angus.	292
Noel, <i>Ex parte</i> & Durnford.	150	Ross et al. v. Converse.	67
		Ross et al. v. O'Leary.	173, 241
		Ross v. Prud'homme et vir.	37
		Rousseau et al. v. Evans.	204
Ontario Bank v. Foster.	398	Roy & Pineau.	10
Oshawa Cabinet Co. Shaw et al.	243	Russell et al. v. Maxwell et al.	91
Oshawa Cabinet Co v. Washburne et vir.	23	Russell & Lefrançois.	17, 64
Ouellette v. Vallières.	86		
Onimet v. Fontaine.	81		
		Saunders v. Herse.	68
Pangman & Buchanan.	388	Sauvé & Boileau.	257
Paradis & Lemieux.	155	Scott v. London Docks Co.	3
Parham v. Maréchal.	54	Senecal v. Hibbard.	220
Peniston v. Chicago etc. Railroad Co.	368	Sheridan case.	281
Penny et al. v. Montreal Herald Printing & Publishing Co.	68	Smardon v. Hamilton et al.	149
People of Michigan v. Mead.	239	Skelton v. Thompson.	272
Perodeau & Quintal.	160	Sociedad v. Docurro.	216
Phelan, <i>Ex parte</i>	261	Spaight et al. v. Gaunt.	410
Pigeon v. The Montreal & Sorel Railway Co.	4	State v. Bassett.	231
Pillow et al., <i>Ex parte</i> , & City of Montreal	209	State v. Cartwright.	322
Pilon, <i>Re</i> , & Foucault.	358	State v. Curtis.	391
Pinsonneault v. De Gaspé.	160	State v. Robinson.	322
Poulin v. La Corporation de Québec.	209, 214	Scott v. Turnbull.	397
Principal de l'Ecole Normale Jacques		State v. Vanderpool.	313
Cartier v. Poissant.	132	Stephen & Walker.	286
" v. Pelland.	133	Sturton v. Whellock.	318
Pugh v. Telephone Co.	105	Symonds v. Hallett.	268
Quebec Steamship Co. & Morgan.	324	Taylor v. Little Rock M. & T. R. R. Co.	231
Quinn & Leduc.	287	Territory v. Kelly.	322
		Therien v. Morrice et al.	110
		Thibaudeau et al. v. Mills et al.	117
		Thompson v. Thompson.	241
Reed v. Anderson.	177	Tompson v. Dashwood.	297
Reford et al. & Les Ecclésiastiques du Séminaire de Montréal.	27	Tourigny v. Wheeler.	336
		Trudel v. Strong.	316

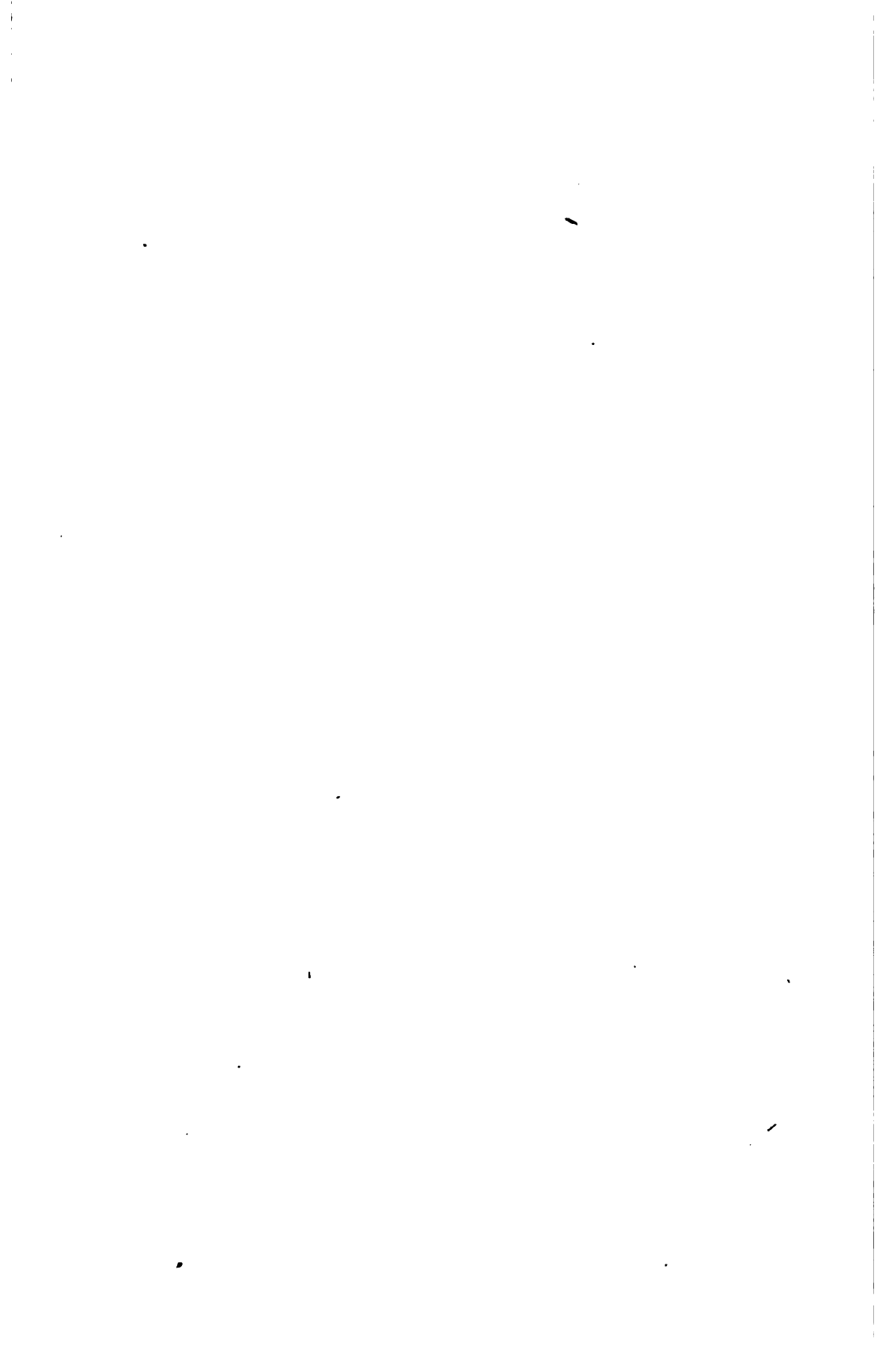
TABLE OF CASES.

VII.

Vallières & Drapeau.....	154	White v. Smith.....	240
Victoria Fire Ins. Co. & Mullin.....	390	Wilhelmy v. Brisebois.....	276
Vidler v. Collyer.....	56	Willett & Court.....	204
Ville de Longueuil v. Cie. de Navigation de Longueuil.....	291	Williams v. Theobald.....	231
		Wilson & Maguire.....	56
		Wright et al. v. Galt.....	42
		Wright v. Wright.....	116
Wackerle case.....	40	Wood v. Harbor Protection Co.....	216
Walters v. Mahan et al.....	316	Woodard v. Butterfield.....	228
Wells v. Sutton.....	320	Woolridge v. State.....	237

ERRATA.

- P. 44.—For "Superior Court" read "Supreme Court."
P. 104 and P. 113.—For "Lord Justice Stephen," read "Mr. Justice Stephen."
P. 165.—For "Doe v. Roe," read "Gaudin v. Ethier."
P. 306.—For "Grevy" read "Grey."
P. 323.—For "Compulsory litigation," read "compulsory liquidation."
P. 326.—For "L. N. 90," read "6 L. N. 90."
P. 344.—For "Court of Review," read "Court of Queen's Bench."
P. 361.—For "To this colleagues," read "To his colleagues."
P. 398.—Supply date, "Montreal, Nov. 30, 1883," to case of *Ontario Bank v. Foster*.



The Legal News.

VOL. VI. JANUARY 6, 1883. No. 1.

ACTIONS OF DAMAGES.

A few days ago, a learned Judge of the Superior Court, who has recently been appointed to the Montreal district, expressed some surprise as well as regret at the large number of actions of damages, which, within a very short time, had been brought under his notice. The damages are claimed usually for slander, or libel, or malicious issue of *capias*, or criminal prosecution. Even a slight affront, or a blow given in the heat of an altercation, often provokes one or more lawsuits. It has been supposed in some quarters that the people of this Province were especially inclined to this class of litigation. We see, however, that even in England, where the expense of legal proceedings might be supposed to check foolish ventures in the law courts, actions of damages are fast multiplying. For example, a club difficulty has just occurred in London. Two brothers of Mr. Chamberlain, President of the Board of Trade, were put up as candidates at the Reform Club. In consequence of a statement circulated by Mr. Lennox Boyd, a member of the Club, to the effect that these gentlemen had been guilty at Melbourne of conduct which called for the attention of the committee of the Melbourne Club, the candidates were blackballed. Mr. Boyd gave his authority for the report, Sir Robert Torrens, K.C.M.G., who on being applied to, persisted in the statement. Thereupon the blackballed candidates have each taken an action for £5,000 damages for libel and slander against Mr. Boyd, and we presume there will be other actions against Sir R. Torrens. The *Times*, referring to the difficulty, observes:—

"We may be pretty sure that, whatever turn the evidence takes, the dispute will prove not to be one which can be discussed with much profit in a court of law. Indeed, the case seems to be typical of a class of litigation which is so rapidly multiplying as to call for observation. In other days when men said unpleasant things of others at clubs and were called to account by those whom they aspersed, the matter was recognized to be purely private, and certainly not needing the interposition of lawyers, and all the machin-

ery and publicity of a trial. If the offence were grave, they agreed to meet some morning. Their seconds, without any fuss, arranged the details; and the principals settled their disputes at an early hour in a quiet corner. It was thought bad taste to let the public into the secret of such quarrels. Men do not now settle their differences with pistols at Wormwood Scrubbs or Wimbledon, and there is no reason why the practice should be revived. But it would not be amiss if the old habit of reticence were to return, and there were a disposition to keep out of courts nice questions of honour which the rough processes of law cannot satisfactorily settle. Where are we to stop if questions about eligibility to a club are to be the subjects of litigation? We may see rival philosophers, opposing schools of theologians, and political leaders appealing to British juries. As to the merits of the dispute between Messrs. Chamberlain and Mr. Boyd, we entertain no opinion. But from the nature of the quarrel there can be but little doubt that it is a mistake to make it the subject of an action in the Queen's Bench Division. People will never be out of litigation if they fly to law whenever they hear that an annoying story about them is in circulation."

DESPATCH OF BUSINESS.

The words spoken by a man who has fought a good fight, and is laying down the burdens which he has long carried well, must always command some attention. The valedictory of Chief Justice Sharswood, the esteemed president of the Supreme Court of Pennsylvania, who has just retired from office after a long and honorable service, is not an exception. In his parting words to the bar of Philadelphia, the Chief Justice modestly disclaims the brilliance and profundity of learning which had been ascribed to him. "With an able, faithful and honorable Bar such as this," he said, "it is by no means wonderful, as Lord Campbell seems to have thought it was, with how little knowledge of law a man may make a great judge. Indeed it may be questioned whether great learning is a desirable quality in a judge. He is apt to wish to display it on all occasions by elaborating long and tiresome opinions and delivering charges unintelligible to juries."

This is the reflection of one who has been over thirty years on the bench, and it is not

wanting in wisdom. Treatises are out of place in the judgments of a court working at high pressure; they may safely be left to the commentators and text-writers.

The Chief Justice next referred to the necessity of rapid work which had been imposed upon him:

"You can easily perceive what injustice was done to suitors 'clamoring for justice,' as the old books have it, by such interminable delays, and how often hope deferred made the heart sick. I saw many sad instances in my brief practice, and carried a deep sense of it with me when I went on the bench. It was a common saying that it was better for a man to abandon a cause however good than to go to law. In 1848, when I was appointed president of the District Court, after three years' experience as an associate, I found the trial list of that court to consist of more than 1,600 cases. I determined, with the concurrence of my associates on the bench, to make the attempt at least to break it down. It was pretty hard work for three men, but with the hearty co-operation of the Bar it was accomplished. In six or seven years the list was reduced to about 600, and there it remained though the business of the court had largely increased—the suits on the appearance docket alone having run up from 2,000 a year to 6,000 and 8,000. I have sometimes been haunted with the fear, that in riding this hobby so hard—driving trials so fast—injustice must have been done to suitors in many cases. It was, however, a choice between two evils—for it is with the administration of justice as with everything else, there is nothing perfect under the sun. It is, indeed, a most difficult problem with any court to reconcile that speed which is necessary to prevent such delay as practically amounts to a denial of justice with the care, study and deliberation required to arrive at the proper determination of important questions. *Festina lente* is the simple rule; but, in its application—*hic labor, hoc opus est*.

"When I took my seat on the Supreme Bench in 1868, the whole number of cases on the argument list for the four districts, Eastern, Western, Northern and Middle, was 660; the cases argued or submitted that year were 375. The list was fearfully growing, rolling up like a great revolving snow ball, not only by *remanets* from one year to another, and the increased business of

the people, particularly the coal and oil operations of the western counties, but from constant additions to the jurisdiction by the Legislature, who never seemed to think that the court had business enough. By laws then existing, it was incumbent on the court to write and file not only an opinion in every case, but upon every point made in every case. These laws, however, were never very strictly observed. When the court thought that the judgment below was right, and ought to be affirmed, they managed, as Judge Kennedy once told me, "to hop, skip and jump" over the errors assigned. When this legislation was repealed in 1871, and the duty of writing and filing opinions confined to reversals, the practice was adopted, that whenever a judgment or decree involving no new principle was affirmed unanimously, to dispose of the case by a *per curiam*, stating briefly the grounds of the decision. They might be disposed of by a simple affirmation. These "per curs," as they are termed, are not so easy as perhaps they seem, and I should like to see the gentlemen that I occasionally hear laugh at them, try their hands in writing them. We are told by Chief Justice Gibson that this was the practice of the court under Chief Justice Tilghman before these laws were passed. Let me mention, in defence of it, that Lord Bacon in his proposition for the amendment of the law, recommended, and Chancellor Kent said, wisely recommended, that "*homonymia*," as Justinian termed them, that is, cases of mere iteration and repetition, "should be purged away from the books," because they do more harm than good. The law now prohibits any case to be published in the regular State reports, which is not ordered to be so by the court. Such, however, is the eagerness of the profession for the latest decisions, that these cases are still reported somewhere, and will continue to be so.

"In 1876 the hour list was adopted. The operation of it was undoubtedly beneficial in disposing of cases and diminishing *remanets*. Yet, from other causes to which I have adverted, the list continued to increase. In 1879, when I succeeded to the chief justiceship, the number had reached 1,339, the largest which had ever been. It was a year of very hard work, as you may judge when I tell you that the arguments were 860. Since then, however, it has been gradually but slowly decreasing. I will not weary you with figures. In the present year the whole number was 1,029; arguments 716."

NEGLIGENCE.

A curious case of negligence was decided by the general term of the New York City Marine Court, in *Keily v. Cotton* (Int. Rev. Rec., Dec. 4, 1882). The defendants, who are dentists, undertook to extract a tooth while the patient was under the influence of an anæsthetic, called laughing gas. In extracting the tooth the forceps slipped and part of the tooth went down the plaintiff's throat, causing coughing and vomiting, which continued at intervals for about four weeks, at the end of which time, in one of these attacks of coughing, the tooth was thrown up and relief followed in due course. *Held*, that the defendants owed extraordinary care, and the question of negligence was for the jury. The Court said: "The defendants knew that the plaintiff, while under the influence of an anæsthetic, had no control of his faculties; that they were powerless to act, and that he was unable to exert the slightest effort to protect himself from any of the probable or possible consequences of the operation which they had undertaken to perform. He was in their charge and under their control to such an extent that they were required to exercise the highest professional skill and diligence to avoid every possible danger, for the law imposes duties upon men according to the circumstances in which they are called to act. In this case skill and diligence must be considered as indissolubly associated. The professional man, no matter how skillful, who leaves an essential link wanting or a danger unguarded in the continuous change of treatment is guilty of negligence, and if the omission results in injury to the patient, the practitioner is answerable. The quantum of evidence necessary to make out a *prima facie* case of negligence is very slight in some cases, while in others a more strict proof is required. Often the injury itself affords sufficient *prima facie* evidence of negligence. Thus, a ballee who returns in an injured condition an article which has been loaned to him is, by this very condition, called upon for an explanation; for a presumption of fault must arise therefrom against him. Although the mere happening of an accident is not in general *prima facie* evidence of negligence, yet the accident may be of such a nature that negligence must be assumed, from the unexplained fact of the accident happening. Thus B., while walk-

ing in a street in front of the house of a flour dealer, was injured by a barrel of flour falling upon him from an upper window; it was held that the mere fact of the accident was evidence to go to the jury in an action against the flour dealer. *Byrne v. Boadle*, 2 H., etc., 722; 33 L. J. Ex. 13; see also, *Scott v. London Docks Co.*, 3 H., etc., 596; 34 L. J. Ex. 17, Ex. Ch. There was evidence offered by the plaintiff showing that while the defendant drew the tooth the forceps slipped. This fact, combined with the unusual circumstance that the tooth went down instead of coming up, was sufficient to carry the case to the jury upon the question of negligence. The trial judge held that while the affirmative was upon the plaintiff to prove negligence, the fact that the defendants, instead of taking the plaintiff's tooth out, let it go down his throat, was sufficient evidence to carry the question of negligence to the jury, to the end that they might determine whether in the light of all the circumstances the defendants had exercised the skill and care which the exigencies of the case required. This ruling was correct."—*Albany Law Journal*.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

QUEBEC, Dec. 7, 1882.

MONK, RAMSAY, TESSIER, CROSS & BABY, JJ.

BLAKE, Appellant, & WADLEIGH, Respondent.

Capias—Affidavit.

An affidavit for capias, under C.C.P. 798, in which, as to the alleged secreting, the deponent swears: "Le déposant est informé d'une manière croyable, à toute raison de croire et croit vraiment en sa conscience que le dit O. B. a caché et soustrait et est sur le point de cacher et soustraire avec l'intention," &c., is sufficient.

RAMSAY, J. This action has come before us in a very inconvenient form. The appellant's factum contains neither the judgment of the Court below, nor the evidence, and only a few lines which have served rather to confuse us than to render us any service. We are all to reverse the judgment, but for different reasons. I shall endeavour to explain the view which leads me to the conclusion that the judgment should be reversed. I think the affidavit is bad on the face of it. Much obscurity is created by confusing

the articles of the Code of Civil Procedure, relating to attachment of goods and *capias*. It is hardly possible to have drawn these articles more imperfectly. All the difficulties of the old statutes have been aggravated by the attempt to introduce the more chaste style of codification. It appears to me that the only way of dealing safely with these articles is by treating each independently. This is evidenced by the cases that have been cited on this appeal. We have been referred to the cases of *Griffith & McGovern*, of *Brooks & Dallimore*, of *Drapeau & Pacaud*, and of *Croteau & Demers*.

It is one of the inconveniences of having to speak in remote places, that as there are no reports traditional rumour takes their place. It appears I gave the first judgment in *Griffith & McGovern*. I maintained the affidavit solely on the ground that it was in the terms of form 45. I never said that the affidavit pursued the terms of article 834. As in this case, it plainly did not follow the terms of the article. In Review this judgment was reversed, as the affidavit did not accord with the terms of the code. This decision is reported 16 L. C. J. p. 338. The case, however, went to appeal, and there the judgment of the Court of Review was reversed. The same question arose in the case of *Brooks & Dallimore*, (6 Rev. Leg. 657), and the reversal in appeal of *Griffith & McGovern* was referred to by Mr. Justice Sanborn, who was attorney and counsel for the unsuccessful party. In the cases of *Drapeau & Pacaud*, and of *Croteau v. Demers*, these former cases were referred to; but I don't think either of them in point, for the Court only decided that the article 798, C. C. P., did not require the deponent to give reasons for his belief. I quite agree to this doctrine, but it does not meet this case.

Art. 798, C. C. P., has two categories, one for leaving the province, and the other for secreting. We have nothing to do with the former of these. The latter is in these words: "Or upon an affidavit establishing, besides the existence of the debt, as above mentioned, that the defendant has secreted or made away with, or is about immediately to secrete or make away with his property and effects with such intent."

The affidavit is in these words: "Le déposant est informé d'une manière croyable, a toute raison de croire et croit vraiment en sa conscience que le dit O. B. a caché et soustrait et est sur le point de cacher et soustraire avec l'intention,"

&c. Now I think it cannot be seriously contended that this affidavit is supported by the words of the Code. But it is said there is a jurisprudence based on inferences. I don't think there can be any inference. The statute gives an extraordinary remedy on making an affidavit to establish a certain fact. Nothing else will suffice. It is for this reason I am to reverse.

The majority of the Court thought the allegations of the affidavit had been disproved, and therefore that the judgment maintaining the *capias* should be reversed. The article of the Code did not require any particular form for the affidavit,—all that was required was that it should establish the fact that defendant had secreted or was about to secrete, and that this was sufficiently done by the deponent swearing to his belief.

Judgment reformed.

COURT OF REVIEW.

MONTREAL, Dec. 29, 1882.

TORRANCE, RAINVILLE, BUCHANAN, JJ.

PIGEON V. THE MONTREAL & SOREL RAILWAY CO.

Action en réintégrande.

This was an action *en ré-integrande*. The plaintiff complained that the defendants had by violence taken possession of his land, to the damage of \$200. The defendants pleaded that they had taken possession of the land with the consent of the plaintiff. The action was dismissed. The Court held that it was proved that the defendants had entered into possession with the consent of the plaintiff, and that the land was bought by the company for a sum of \$17; that therefore the present demand was inadmissible.

TORRANCE, J. In arriving at this decision, the Court had used its right of appreciating the evidence put before it, and we see no error. In the words of Pigeon, 2nd Tom. 131: "La réinté-grande a lieu quand il y a spoliation par vole de fait." There was here no spoliation and no *voie de fait*.

Judgment confirmed.

Geoffrion & Co. for plaintiff.

Kerr & Carter for defendant.

JUDICIAL REFORM.

The report of the proceedings at the sittings of the General Council of the bar of the Province of Quebec, held in Montreal on the 8th, 9th, 26th and 27th of December, 1882, and at which several resolutions were adopted which will be submitted to the Quebec Government as important amendments to the legal procedure of the Province, has just been completed by the General Secretary of the Council. At these four sittings there were present Mr. William White, Bâtonnier of Sherbrooke, and Bâtonnier-General of the Province; Hon. H. G. Malhiot, Bâtonnier of Three Rivers; Mr. W. W. Robertson, Bâtonnier of Montreal; Hon. R. Laflamme, Q. C., delegate of Montreal; Mr. H. C. Cabana, delegate of Sherbrooke; Mr. L. N. Denoncourt, Q. C., delegate of Three Rivers, and Mr. S. Pagnuelo, Q. C., General Secretary.

FIRST SITTING.

On the 8th of December the Council went, upon invitation, into the Chambers of the Judges of the Superior Court, Montreal, and there met the Hon. Justices Torrance, Rainville, Jetté, Papineau, L. O. Loranger and Doherty, and the Hon. T. J. J. Loranger, Commissioner for the codification of the statutes. A general discussion was engaged in upon the different questions of judicial reform, principally upon the composition and organization of the Superior Court and the Court of Review, upon the mode of trying cases and of taking evidence, upon the advisability of having the Superior Court and Court of Appeal to sit permanently by abolishing terms, upon judicial statistics and the imperfect mode in which they are prepared and published, upon the advisability or necessity of bringing all the judges of the Superior Court to reside in the principal cities, and thence going on circuit as a condition of the plurality of Judges sitting in the Superior Court and as a means of expediting business in Montreal. After a general discussion on these matters the Council adjourned to their own room, and then the sitting was adjourned until next day.

SECOND SITTING.

On the 9th of December the Council resumed its sittings with the same members present, and with the Hon. T. J. J. Loranger, Commissioner, upon invitation.

After routine business,

Hon. Mr. Loranger gave explanations upon his report to the Government, and stated that the causes of complaint arose mostly from the slowness of trials, the increase of costs which followed, the too great number of degrees of jurisdiction, and the trivial interest of many cases taken in or evoked to the Superior Court. He proposed to abolish, first, the Court of Review; secondly, the statutory appeal to the Privy Council, and thirdly, to abolish evocations from the Circuit Court to the Superior Court, and to determine the value of immovables in all real or mixed actions. He proposed to have oral trials for all cases in the Circuit Court under \$100. Evocations, he said, were the result of the effect given to a decision as *res judicata*. In France and at Rome, the judges were the same for great and petty cases. Here, it was different. By means of oral trial in all cases under \$100, it would be impossible to say that the issue was the same. When evocation shall take place, it shall be only after the filing of the pleas. He proposed to abolish all appeal from interlocutory judgments, and to abolish also the reasons of appeal and factums.

The CHAIRMAN observed that it would be better not to try too radical changes, and to restrict new legislation to the most pressing wants, and communicated amendments suggested by the Bar of Sherbrooke.

The Secretary remarked that the Council had not the time to enter into all the details of a new code of procedure, and that it was necessary to restrict the discussions to the most important features, and to ask that the legislature at its next session should adopt the important and pressing reforms that the Council would suggest, leaving to the codifiers to mature the draft of re-organization or reformation of the Courts and of the code of procedure which should be adapted to the new state of things.

The following resolutions were proposed and unanimously adopted:—

1. Proposed by Mr. W. W. ROBERTSON, seconded by Mr. H. C. CABANA, "That the system of permanent sittings of the Courts be adopted, so that every juridical day in the year be a day for hearing subject to the Council of the Bar of the District, together with the residing judge, determining special days when the Courts shall sit; all questions of procedure, with the exception of the taking of evidence and hearing at the same time may be had in Chambers on any of the days not fixed for evidence and hearing at the same time.

2. Proposed by Mr. H. C. CABANA, seconded by Mr. W. W. ROBERTSON, "That the existing system of taking evidence be changed and a sufficient number of competent official stenographers be appointed in every District, whose duty it shall be to take evidence *ex long* in all.

cases to the end that all the Superior Court cases may be tried in the presence and under the direction of the Court; that the stenographer's record be extended only in cases of appeal (or at the request of either party, at their own expense), and then at the original expense of the appellant, who shall be bound to print a case for appeal, the cost to be reimbursed in the event of the judgment being reversed.

3. Proposed by Hon. B. LAFLAMME, seconded by Mr. W. W. ROBERTSON, "That a party may be examined as a witness in his own behalf at the commencement of the evidence.

This resolution was carried on division, the Hon. Mr. Malhiot voting against it.

4. Proposed by Mr. DEYONCOURT, seconded by Mr. CABANA, "That all cases between \$100 and \$200 be taken in the Superior Court, and that all such cases now pending be transmitted to the Superior Court of the district."

5. Proposed by Mr. PAGNUELO, seconded by Hon. Mr. LAFLAMME, "That the appeal be taken on a simple inscription, and on security being given according to the usual mode; that a counter appeal may be taken without cost on a simple notice from the respondent; that there be paid the Prothonotary \$5 to prepare and transmit the record, and to receive the security and \$5 in stamps for the Government on the inscription; that afterwards there shall be paid only \$10 in appeal upon the final judgment and 50 cents on each motion or petition, and no other disbursements shall be required on appeal; that the reasons of appeal be abolished, but the factum preserved."

6. Proposed by Mr. PAGNUELO, seconded by Hon. Mr. LAFLAMME, "That every party condemned by default to appear or plead, may proceed against such judgment, whether taken in term or vacation, according to Articles 484 and following of the Code of Procedure."

7. Proposed by Mr. ROBERTSON, seconded by Mr. CABANA, "That the plaintiff may give his affidavit when he takes his action or at any time afterwards, and inscribe afterwards for judgment on such affidavit when judgment may be taken on such affidavit."

8. Proposed by Mr. PAGNUELO, seconded by Hon. Mr. LAFLAMME, "That it is advisable to repeal the statute which abolishes appeal from judgments of the Court of Review confirming the judgment in the first instance."

The Council then adjourned until the 26th December.

THIRD SITTING.

On the 26th of December the Council resumed, when the same persons were present.

After routine business,

It was proposed by Hon. Mr. MALHIOT, seconded by Hon. Mr. LAFLAMME, and resolved, "That the following be added to the sixth resolution of the 9th of December:—

"But no opposition to judgment shall be

"allowed in any case unless the party condemned swears that he has a good defence to the action, which defence shall be set out, and that he has been prevented from filing such defence by surprise, fraud or for other just cause which shall be considered just and sufficient."

FOURTH SITTING.

At the last sitting on the 27th of December, It was proposed by the Hon. Mr. LAFLAMME, seconded by Mr. ROBERTSON, and resolved, "That it be provided by an express disposition of the Code of Procedure for the introduction of *référé* or summary proceedings in Chambers, as established by Articles 806 and following of the French Code of Procedure, for all cases of urgency or requiring celerity, or where there will be occasion to give provisional orders upon the difficulties relating to the execution of judgments. The following shall be considered as urgent affairs within the jurisdiction of the Judge in Chambers, leaving to his appreciation the other cases:—

"1. Proceedings for sale for false bidding.

"2. Proceedings to obtain possession of an immovable sold by the Sheriff, or other sale of the same nature.

"3. Difficulties between solicitors and clients upon questions of fees.

"4. The refusal of a notary to obey an order to deliver copy of an unregistered deed, or of a deed not completed.

"5. Contestations on the affixing of seals.

"6. Questions arising out of the making of an inventory.

"7. Urgent measures and authorizations for the administration of community property, of succession, and of partnerships, when partners disagree.

"8. Questions about notices to resiliate leases or about making sub-leases, managing or selling a stock in trade, administering provisionally a succession.

"9. Difficulties arising at or after a sale of movable property after the death of the owner, such as oppositions to the sale, a revendication of some of the effects.

"10. All proceedings by experts, in order to determine the state of an immovable, nomination of surveyors for determining bounds or metes.

"11. Oppositions to judgments, seizures and sale.

"The judge may allow to summon parties in all such cases, either to the Court House or to his own house, or at an hour determined by him, and even on holidays. Orders in Chambers shall not prejudice the case, they shall be executory provisionally, with or without security as the Judge may order. They shall not be susceptible of opposition. In a case where an appeal lies, such appeal may be taken without

delay, but shall not be allowed 15 days from the date of the execution of the order of the denunciation. The appeal shall be adjudged summarily and without writings."

Proposed by Mr. PAGNUELO, seconded by Mr. CABANA, and resolved, "That in all cases requiring celerity, and in all urgent suits, the Judge may determine summarily the delay of summoning parties, which may be from day to day and from hour to hour. The defendant shall always, upon the Judge's order and after a simple notice, have the right to force the plaintiff to return the writ before the day set out in the writ for its return, under such penalty as the Judge may determine, and even under pain of non-suit."

Proposed by Hon. Mr. LAFLAMME, seconded by Mr. DENONCOURT, and resolved, "That the Articles of the Code of Procedure, referring to garnishments before judgment, conservatory seizures and others of the same nature, also to *capias*, be amended so that the Judge may, upon the deposition which he shall hold sufficient, allow provisionally the issuing of such seizure or of a *capias* with or without security on behalf of the plaintiff, saving the right to the defendant to contest summarily such proceedings upon a simple notice given from day to day or from hour to hour to the plaintiff or his attorney, and saving the right of the judge to revoke the order given, or to permit or to accept such security which he shall hold sufficient, or to give provisional possession of the effects seized to one or other party without prejudice to appeal to the court, which appeal shall be decided summarily."

Proposed by the Hon. Mr. LAFLAMME, seconded by Mr. CABANA, and resolved, "That the system of a single Judge in the first instance is the only one desirable and practicable."

Proposed by the Hon. Mr. LAFLAMME, seconded by Mr. PAGNUELO, "That in our present system of procedure, the Court of Review is necessary."

Mr. CABANA proposed an amendment, to which Mr. PAGNUELO proposed an amendment to the amendment. Afterwards, objection was taken to the amendment of Mr. Cabana as being irregular, and it was ruled out of order by the Chairman, upon which Mr. Pagnuelo withdrew his amendment.

It was then moved in amendment by the Hon. Mr. MALHIOT, That the principal motion be amended by adding thereto the following words:—"That it is necessary that the Court of Review shall sit five times a year at Three Rivers to hear the cases inscribed from the Districts of Three Rivers, Richelieu and Arthabaska, and five times a year in the city of Sherbrooke for the cases inscribed in the Districts of St. Francis, Bedford and Beauce."

Upon the vote being taken, the amendment was lost on the following division:—

Yeas—Hon. Mr. Malhiot, Messrs. Cabana and Denoncourt.

Nays—Hon. Mr. Laflamme, Messrs. Robertson, Pagnuelo and White (chairman).

The main motion being now brought up, it was proposed in amendment by Mr. WHITE, "That the Court of Appeal in this Province would be sufficient for all the purposes of review and appeal, if procedure in Appeal were simplified and rendered more expeditious and less costly; that the Court of Appeal should be presided over by four Judges only, and in case of an equal division amongst them, the original judgment should be confirmed."

This amendment was also lost upon the following division:—

Yeas—Hon. Mr. Malhiot, Messrs. Cabana and White.

Nays—Hon. Mr. Laflamme, Messrs. Robertson, Denoncourt and Pagnuelo.

The main motion was then put and carried on the same division.

It was then proposed by the Hon. Mr. MALHIOT, "That in order to save costs to parties and to obviate the serious inconveniences which are felt from the accumulation of affairs in the Court of Review at Montreal, it is advisable that the Court of Review shall sit five times a year at Three Rivers for hearing cases inscribed in Review in the Districts of Three Rivers, Richelieu and Arthabaska, and an equal number of sittings at Sherbrooke to hear cases inscribed in the Districts of St. Francis, Bedford and Beauce."

Upon this motion being put, the vote stood:—

Yeas—Hon. Mr. Malhiot, Messrs. Cabana and Denoncourt.

Nays—Hon. Mr. Laflamme, Messrs. Robertson, and Pagnuelo.

The CHAIRMAN (Mr. White) gave his casting vote in favor of the motion, which was carried.

Mr. PAGNUELO proposed "That the Court of Review should be composed during, at least, a year, of a Judge of the Superior Court residing in Montreal, a Judge residing in Quebec, chosen by the Judges of those districts, and of a third Judge from the rural districts, chosen by the two first-named from time to time as they would sit in Quebec or in Montreal; that the said Court should sit permanently say four days a week, according to the number of cases before the Court and until the roll is exhausted. Its judgment should be rendered without delay or on short delay."

This resolution was carried on the following division:—

Yeas—Hon. Mr. Laflamme, Messrs. Pagnuelo, Robertson, Cabana and Denoncourt.

Nays—Hon. Mr. Malhiot.

It was proposed by Mr. PAGNUELO, seconded by Mr. DENONCOURT, and unanimously resolved, "That before judgment and before *délibéré*, if there is occasion for *délibéré*, the judge of the Superior Court and the judges in Review and

in Appeal, shall settle amongst themselves on the bench, together with the counsel of the parties, who shall have a right to make suggestions, a statement of the questions of fact and of law which arise in the case, beginning with the questions of fact. The deliberations shall be held as much as possible and the questions decided in that order. This statement of facts shall not be final, but may be revoked or changed during the *délibéré*. Every judgment shall decide in a categorical manner the points of fact and of law, the solution of which is essential to the trial, beginning with the points of fact, and shall consider questions of law only if the decision of the fact does not carry the judgment."

Proposed by Hon. Mr. LAFLAMME, and resolved, "That the terms of the Court of Appeal be abolished, and that the said Court do sit almost permanently in Montreal, say four days a week, with the exception of four terms in Quebec, of the long vacation, and after vacation from Christmas to the 15th January, and that the Criminal Court should never be an impediment to the sittings of the Court of Appeal."

Mr. WHITE proposed "That the Court of Appeal be composed of four Judges, and that in cases of an equal division the judgment in the first instance be confirmed. This rule to apply only to the merits of appeals."

This motion was lost on the following division :—

Yeas—Messrs. White, Pagnuelo and Cabana.

Nays—Hon. Messrs. Laflamme and Malhiot, and Messrs. Robertson and Denoncourt.

It was proposed by Mr. PAGNUELO, and unanimously resolved, "That a Judge of Appeal in Chambers may give such order as he shall think proper in reference to questions of procedure or requiring celerity, saving the right to a summary appeal to the tribunal upon a simple notice."

Proposed by the Hon. Mr. LAFLAMME and resolved, "That every appeal from interlocutory judgments be decided summarily and without proceedings upon a simple inscription."

The question of the nomination of official stenographers, of their salaries and of the examination which they shall pass, being presented to the Council, it was resolved that discussion on the matter be postponed to the next sitting.

It was also resolved that the resolutions adopted be published in the newspapers, and the Secretary was instructed to write to the Premier of the Province, requesting him to take charge of the bill for amending the Act incorporating the Bar of the Province, conformably to the resolutions adopted on the 26th July last.

The sittings of the Council were adjourned to Quebec during the first days of the next session of the Legislature, when the Council shall be called together by the Bâtonnier.

CORRESPONDENCE.

LAWYER'S LETTER.

To the Editor of the Legal News:

DEAR SIR,—On the 4th inst., Judge Loranger decided in a case of *Margaret Lennox v. Angus Thom* (O.C.M.) the vexed question as to who should pay the costs of a lawyer's letter, when the claim was paid on the receipt of the letter and before suit brought.

The Judge at the argument requested Mr. Hutchinson (Macmaster & Co for defendant), and myself (for plaintiff), to send up any former decisions on the subject we might find, as he wished to consult them and his brother Judges in the matter, and give a decision on the point which might be considered a final one.

After doing so he decided in favor of the plaintiff, holding the debtor liable for the costs of the letter.

If you think this sufficiently important to occupy a place in your valuable journal, I trust you will insert it; as I have been requested by numerous members of the Bar to have the case reported.

Yours faithfully,

CHAS. RAYNES.

Montreal, Dec. 20, 1882.

GENERAL NOTES.

The Parliament of Canada meets for the despatch of business on Thursday, 8th February.

Mr. Lewis Wallbridge, of the Ontario bar, has been appointed Chief Justice of the Court of Queen's Bench for Manitoba, with the title of "Chief Justice of Manitoba," in the place of the late Chief Justice Wood.

A legal journal in Toronto (not the *Canadian Law Times*) which has had a good deal to say (and very properly too) about unprofessional advertising, proclaims itself, in an announcement in *Littell's Living Age*, as "the only legal periodical of any importance in the Dominion." Without going beyond Toronto, we should be inclined to judge that the *Canadian Law Times* is at least of equal, if not greater, importance. Unprofessional advertising is no doubt a grave impropriety, but lying is a vice, for which rather a serious penalty is enacted: *Vide* Revelation xxi. 8.

The death of M. Lachaud, the eminent French advocate, is announced. M. Lachaud was born in 1818, and admitted to the bar in 1846. He acquired a reputation for eloquence in the celebrated case of *Madame Lafarge*. He was counsel for Lamirande, whose extradition from Canada created so great a sensation. He defended Marshal Bassine before the Council of War which condemned that General to death for surrendering Metz to the Prussians. M. Lachaud assumed the defence of prisoners notoriously guilty, and trusted a good deal to rhetorical tricks to influence the jury.

The Legal News.

VOL. VI. JANUARY 13, 1883. No. 2.

JUDICIAL REFORM.

The meetings of the General Council of the Bar to discuss suggestions for judicial reform show gratifying signs of vitality. It is to be hoped they may have influence to arrest the attention of Ministers sufficiently to make them understand the importance of the subject, and appreciate the certain inconveniences of the *status quo*. We all know that every movement to that abnormally constituted institution, a popular government, is more or less perilous; but those who seek for the honours of public life should remember that there is a corresponding duty—*noblesse oblige*. It is not to be expected that the Attorney-General, with all the major cares of administration on his hands, should attempt to work out the details of the very important reforms demanded by the great increase of legal business in Montreal, but he should name a commission to draw the amendments, and he should find the time necessary to make himself perfectly familiar with the reasons for and against any proposed change. A measure so prepared should be then introduced, and if the commissioners be properly selected, it would probably be dealt with in the House of Assembly as a non-political question. In proposing a commission, an unpaid commission is intended. Paid commissions are almost always turned into jobs. They are directed to the most eager rather than to the fittest persons. The unpaid commissions will not be run after with indecent zeal. Three commissioners are enough, and they should all be residents of the same locality. The whole cost of the thing would be the salaries of one or two clerks, and a little printing. Such a commission could easily have its report ready for the 1st of March.

The suggestions already made by the General Council are for the most part in the right direction. They recognize a principle that is very valuable in all wholesome progressive movements, and that is to avoid revolutionary tendencies. The great object in dealing with legal procedure is to seek to simplify rather

than to hurry. While it is perfectly true that every legal delay so far defeats the abstract idea of justice, it is against the nature of legal proceedings to be very expeditious. Time must be given to both parties to state their case, and opportunity must be given to the judge to become acquainted with the matter. It is as absurd to suppose that a judge can be ready for each case at a given moment as to expect that each traveller is to find a train ready to start at the instant he desires to move. *Vis inertiae*, the most formidable force of parliamentary governments, is alone responsible for our difficulties. The number of judges of the higher courts of law here, is considerably in excess of the requirements of the country, the distribution of their work is ridiculous. Here, then, is a point for wholesome change and reform.

The General Council has wisely rejected the idea of altering the one judge system and of doing away with the Court of Review. Any one who can count his fingers and thumbs must be able to assure himself that the abolition of the Court of Review means the blockade of the Court of Appeals. Curious to say, after twice rejecting the proposition to do away with Review, the Council passed a resolution to allow appeal from the confirmatory judgment in Review. This looks as if the practitioner's love of a multiplicity of appeals had a disturbing influence on the deliberations of the Council.

The rejection of so much of Mr. White's motion as proposed to make the quorum in appeal four, and in case of equal division to make it a confirmation of the judgment appealed from, is unfortunate. It is the true juridical idea. The decision in first instance should count for something, and the hostility to the rule advocated by Mr. White is not the outcome of reason. It is the sporting notion which prevails, "to start with equal chances." But the doctrine of chance does not fairly apply.

Again, tramping the Court of Review about to Three Rivers and St. Francis, may suit the convenience of lawyers practising in these places, but it is not for the general advantage. It will only serve to delay the business of the Court, and waste the time of the Judges.

The least commendable of the suggestions was proposed by Mr. Pagnuelo, seconded by

Mr. Denoncourt, and *unanimously resolved*. It was to this effect: "That before judgment and before *délibéré*, if there is occasion for *délibéré*, the judge of the Superior Court and the judges in Review and in Appeal, shall settle amongst themselves on the bench, together with the counsel of the parties, who shall have a right to make suggestions, a statement of the questions of fact and of law which arise in the case, beginning with the questions of fact. The deliberations shall be held as much as possible and the questions decided in that order. This statement of facts shall not be final, but may be revoked or changed during the *délibéré*. Every judgment shall decide in a categorical manner the points of fact and of law, the solution of which is essential to the trial, beginning with the points of fact, and shall consider questions of law only if the decision of the fact does not carry the judgment."

In other words, after the argument there shall be a *délibéré* in open court, to which the lawyers shall be parties; this *délibéré* is not to be final, or to be binding in any way on the court. As a coercive measure it is therefore useless, and except for the purpose of having unseemingly wrangling between the bench and bar, it is difficult to understand what in this resolution recommended itself to the unanimous approbation of the General Council. The chief object of the verbal argument is to enable the Court to ask for explanations from the parties. If the Court, in its turn, is to be interrogated verbally before pronouncing judgment, it will only be reasonable to give the judges time, after they have the record before them, to prepare for the ordeal. It sometimes makes one question the possibility of reform when one sees it arrayed alongside such chimeras. Government is summoned at all hazards to render the administration of justice more expeditious by those who, in the same breath, suggest endless journeyings for the judges, and new complications of procedure not only without precedent but unnecessary and mischievous.

The suggestion to do away with terms, and in some instances with writs, deserves much more favorable consideration. It is impossible to conceive why the attorney should not draw his own writ and get it registered and sealed before service, except that even that much

maligned and generally prosaic personage has little concealed corners of romance and veneration, for which, the outer world does not give him credit. He has a superstitious regard for "the Queen's Writ," and it sometimes helps him out in his little flights of turgid eloquence when he has a bad case. To say that the defendant B had neglected "my writ" is evidently a less striking proposition, but it might be made equally effective. And after all, this is only another way of putting the matter, for we no more intend to deprive the summons of the effigy of the Crown, than to displace the death's head and cross bones in black sealing-wax on the coroner's inquest. Where there are resident judges, and trial by jury is not the ordinary process, the term is simply nonsense.

The appeal from interlocutory judgments is one of the things that least wants touching. Mr. Loranger wishes to abolish it altogether: Mr. Pagnuelo seeks to facilitate it. Both extremes are bad. These appeals are not allowed without some cause shown, and nothing can be much more summary than the procedure to obtain leave to appeal; but to refuse all interlocutory remedy would surely work great injustice, and give rise to the suspicion of much more.

To be only a critic, is to follow a narrow trade, let me therefore make one suggestion to the General Council. It is to divide the Court of Appeals into two chambers of three judges each. The judgment of three judges is quite worth that of five, and Mr. Pagnuelo may feel assured that such a change will do more to improve the *délibéré* than his having a finger in the pie—as counsel for an interested party be it understood. With this change the jurisdiction in Review might be limited to interlocutory judgments and procedure, without any separate appeal. B.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

QUEBEC, December 7, 1882.

DORION, C.J., RAMSAY, TESSIER, CROSS & BASTY, JJ.

ROY, Appellant, and PINEAU, Respondent.

Will—Exercise of power—Great grand-children.
A wife, commune en biens, constituted by will her husband her universal legatee, charging him to return her real estate, either by donation

entre vifs or by will, to such of her children or grand-children as he might select, subject to such charges as he might impose. The husband by his will, without referring to his wife's will, appointed three of his grand-children his universal legatees, and substituted to them some of his grand-children. Held, that this was a valid exercise of the power conferred on him by the wife's will, great grand-children being included in grand-children, and the husband, moreover, having power to impose charges.

Julie Michaud, wife of Jean Corriveau, by her will constituted her husband her universal legatee, charging him to return either by donation *entre vifs* or will her real estate to such of her children or grandchildren as he might select, subject to such charges as he might impose.

Corriveau made a will constituting three of his grandchildren his universal legatees of all the real estate belonging to him that day, and to them he substituted some of his great grandchildren. He made no direct mention of his late wife's will, or that he intended to perform the duty imposed upon him by it; but he enumerated the properties he referred to, and they comprised those belonging to his late wife. He also left his present wife the usufruct of one-half of one of these properties, which half he declared to be his, as being part of his share in the *communauté* existing between him and his late wife. The first *appelés*, now *grevés*, neither accepted nor renounced the succession of Jean Corriveau. They were sued by one Hamel, judgment went by default, and the appellant became *adjudicataire* at sheriff's sale of one of the properties coming from Corriveau and Julie Michaud, his first wife. The action is by the *grevés*, defendants in the suit by Hamel, and by the *appelés*, to oust the appellant of one-half of the real estate adjudged to him.

RAMSAY, J. The first question that arises on this appeal is whether Jean Corriveau has exercised the faculty accorded to him by the 4th clause of his first wife's will?

Neither by deed of donation *entre vifs*, nor by will, did Jean Corriveau declare that he intended to exercise the power granted by his wife's will; but he did, in effect, dispose of all the real estate of which he died possessed to certain of the persons indicated as possible *appelés* by the will of his first wife. It might, perhaps, have been a

question whether the general disposition of all the "*biens qui m'appartiendront ce jour*," covers any disposition of his late wife's property, but he gives an enumeration of the immovable property which he calls his, and it includes his wife's share of the community. Besides, there is nothing incorrect in his calling it his; for although the legacy to Jean Corriveau was limited by the substitution of some or all of the children, he was a proprietor and not a *usufruitier*. In *Benoit & Marcile*, a case not unlike the present, the majority of the Court held that the bequest to the husband was a usufruct (1 Rev. de Leg., p. 140), but I don't think this is the construction to be put on the will of the first wife in this case. Nor do I think it should affect the question if we were to hold it was the bequest of a *usufruit*, for the error of a *usufruitier* calling himself a proprietor is not surprising, and is easily explained. Besides the enumeration of the property, there is also a bequest by Jean Corriveau to his second wife of the usufruct during her life or *viuité*, of the half of the mill belonging to him, as being part of his share of the *communauté* existing between him and his first wife, and all his moveables, over which he had complete control, indicating so far as acts can, that he had fully in view, while making his own will, the obligations imposed by the will of his first wife. I, therefore, think we should hold that Jean Corriveau exercised the faculty conferred upon him, and I think he exercised it rightly although the will only mentions children and grand-children. He was expressly allowed to stipulate charges, and great grand-children should be included in grand-children, just as grand-children are included in children. See the decision of Papiusianus, on which Pothier relies. Subst. 4to Ed 515. See also 3 Henrys, p. 76, as to effect of *substitution générale* by testament.

The next question is as to the effect of the *Décret*. It was in a suit of *Hamel & Pineru et al.*, and it is admitted that the suit was against the same *grevés* as those in the present action. Their subsequent renunciation to the succession of Jean Corriveau, even if it were a renunciation to the succession of their grand-mother, would not discharge them of the judgment in the suit which they had not defended, and from which there is no appeal. The principle of the right to renounce at any time until actual

acceptation, by word or deed, is subordinate to the principle of the *res judicata*, which creates a presumption *juris et de jure*, between the parties. Pothier puts this very clearly in the *Cont. d'Orléans*, cited by appellant, p. 595 4to. Ed.

I don't think the *appelés* have anything to say in the matter. I am therefore to reverse.

SUPERIOR COURT.

MONTREAL, Dec. 23, 1882.

Before TORRANCE, J.

MANTHA v. SEGUIN.

Capias—Secretion.

The defendant refused to deliver wood according to contract, demanding a higher price than had been stipulated in a notarial agreement. Held, that this was not a secreting, and the capias issued against him was quashed, without costs.

PER CURIAM. The question here was the merits of a *capias* taken against the defendant for the sum of \$625. The ground was that he was secreting his estate.

The parties were dealers in wood. The defendant lived at Plantagenet in Ontario, and undertook by a notarial agreement, in October, 1880, to deliver to the plaintiff in 1881, 450 cords of wood, with cribs, at the Bord au Plouffe. The consideration was the sum of \$450. \$100 was cash, and \$100 was payable in the winter, and the balance on the delivery of the wood. The wood was not delivered in 1881, owing, it would appear, to the low water in the rivers. Of the winter payment, \$75 was paid, leaving unpaid \$275. The wood was ready at the Bord au Plouffe on the 24th July, 1882, but Seguin was not ready to deliver without an increase of price as a compensation for not having received the whole of the second instalment of \$100 in the winter, namely \$25, though there is no proof of his having asked for it, and, on the contrary, he asked for and received \$50. Seguin says himself in his deposition, folio five, that he refused to deliver without being recompensed. The fact was that the price of wood had advanced, and Seguin was interested in demanding a higher price, but it was contrary to his agreement. Mantha then tendered the balance of the price, \$275, which was refused, and a seizure took place accompanied by a *capias*, on the ground of secretion.

I do not consider that secretion has been proved. On the contrary, my conclusion is that it has been disproved. At the same time, I have no doubt that Seguin alarmed Mantha by his acts as well as his words. I hold that the probabilities are that Seguin was in easy circumstances, possessed of land and moveables at his domicile. The trouble was brought on by his greed in endeavoring to make a better bargain with Mantha. After the attachment and *capias* friends endeavored to make peace, and I commend them for it, but they failed though nearly successful. Mantha offered a sum of money for a settlement, and the offer was at first entertained, though finally abandoned by mutual consent. It is to be regretted that the wiser counsels did not prevail. My conclusion is that the petition should be granted, but in view of the circumstances of the case, and the blameworthy conduct of Seguin, it is ordered that each party pay his own costs on the petition now disposed of. Petition granted.

Madore for plaintiff.

Auge for defendant.

COUR SUPÉRIEURE.

MONTREAL, 14 mars 1881.

Coram RAINVILLE, J.

LOUIS DUPUY es-qualité v. MICHEL BOURDEAU, et ALEXIS CHÉRI BOURDEAU, opposant *afin de charge*, et OCTAVE PINSONNAULT, opposant *afin de conserver*, contestant.

Bail—Opposition afin de charge.

PER CURIAM. Le demandeur ayant fait saisir un immeuble sur le défendeur, l'opposant a produit une opposition *afin de charge*, demandant que la vente n'ait lieu qu'à la charge de son bail. Il allègue un bail authentique pour l'espace de huit ans, et l'enregistrement de ce bail en date du 29 novembre 1878. Cette opposition est contestée par Pinsonnault, qui allègue :

Que par un acte de vente dûment fait et passé le 23 mai 1868, devant M^{re} Labelle, notaire public et témoin, au dit lieu de St. Michel Archange, le dit opposant et contestant, vendit au défendeur, Michel Bourdeau, fils, la terre désignée au dit acte produit comme partie des présentes et qui est la même que celle saisie en la présente cause, à la poursuite du demandeur Dupuy, es-qualité, et à laquelle s'applique la dite opposition *afin de charge* ;

Que cette vente fut ainsi faite pour entr'autres considérations, le prix de 18,000 livres, ancien cours, que le défendeur promit et s'obligea de payer au dit contestant, aux termes, avec les intérêts et de la manière mentionnés au dit acte;

Que le dit acte de vente a été dûment enregistré en entier au Bureau d'Enregistrement du comté de Napierville, dans les limites duquel la dite terre était et se trouve située, le dixième jour de décembre 1869;

Que le dit jugement du 22 novembre 1879, en exécution duquel est émané le dit bref d'exécution ainsi noté comme *opposition afin de conserver* est pour des arrérages dûs sur le prix de vente, savoir : pour la somme de \$500, montant collectif des onzième, douzième et treizième instalments échus respectivement en mars 1877, 1878 et 1879, avec intérêts au taux de huit pour cent par an, à compter du 1er avril 1879, et les frais y relatifs, tel que mentionné au dit Bref et au dit Jugement produits en cette cause;

Que la dite terre se trouvait affectée et hypothéquée par privilège de *baillleur de fonds* pour la sûreté et le paiement du dit prix de vente, en capital, intérêts et frais accrus et à accroître, sur le dit jugement et de préférence à tous autres créanciers, et nommément de préférence au dit opposant Alexis Chéri Bourdeau, et à l'encontre de ce dernier et de tous les prétendus droits réclamés par sa dite *opposition afin de charge*, en vertu du prétendu bail, servant de base à cette dernière opposition;

Que d'ailleurs tous les allégués de la dite opposition *afin de charge* et chacun d'eux sont faux, insuffisants et mal fondés en droit et en fait;

Que le prétendu bail ne pourrait être, dans tous les cas, qu'un acte simulé concerté entre le dit opposant, Alexis Chéri Bourdeau, et le défendeur, son frère, (dont l'insolvabilité était alors notoire et l'est encore) au préjudice et en fraude des créanciers nombreux de celui-ci, et dans le but de faire des embarras au dit contestant et de lui faire tort."

Toute la question est de savoir si un bail constitue une charge sur la propriété louée.

Sous l'ancien droit le bail n'engendrait que des obligations entre le baillleur et le preneur, et le successeur à titre particulier du baillleur, l'acheteur par exemple, avait le droit d'expulser le preneur ou locataire. Ce droit a été changé

sous le C.N. et par l'art. 1743, l'acquéreur ne peut plus expulser le fermier ou locataire lorsque le bail a une date certaine. Troplong a vu là la création d'un droit réel; mais son opinion est combattue par la généralité pour ne pas dire l'universalité des auteurs, qui ne voient dans cette disposition de l'art. 1743 que l'application d'une convention tacite entre le vendeur et l'acquéreur d'un bien affermé d'entretenir le bail existant.

Notre Code, art. 1663, reproduit exactement les dispositions du code français.

On créait donc un droit occulte secret, et l'acquéreur d'immeuble pouvait se trouver en face d'un locataire qui aurait droit d'occuper cet immeuble pendant plusieurs années. C'aurait été un grave inconvénient et dans bien des cas une grande injustice.

On en a tellement senti les inconvénients en France, que la loi du 23 mars 1855, a ordonné la transcription des baux de plus de 18 ans; car comme dit si bien Flandin, que le droit du preneur soit ou ne soit pas un droit réel, il n'en est pas moins certain que le bail à longues années, s'il n'est pas, comme l'usufruit, un démembrement de la propriété, altère sensiblement la valeur vénale de l'immeuble, qu'il constitue ainsi, une charge que les tiers sont intéressés à connaître.

1 Flandin, Transcript. No. 496.

C'est ce qu'ont fait nos codificateurs en exigeant l'enregistrement des baux excédant un an. Le bail d'immeubles pour un terme excédant un an, dit l'art. 2128, "ne peut être invoqué à l'encontre d'un tiers acquéreur s'il n'a été enregistré."

Les commissaires ayant suggéré cette disposition nouvelle disaient dans leur rapport : "Ayant suggéré d'amender la loi en force, telle qu'exposée en l'art. 56 du titre : *Du louage* (qui est maintenant l'art. 1663 de notre Code) et de déclarer qu'à l'avenir la vente par le locateur de l'immeuble ne mettra plus fin au bail, l'adoption de cette disposition ferait du bail une charge sur l'immeuble, qu'on doit soumettre comme toute autre charge, à la publicité."

L'opposition est donc maintenue, et voici le jugement de la Cour :

"Attendu que l'opposant afin de charge, Alexis Chéri Bourdeau, s'oppose à la vente de l'immeuble saisi en cette cause, à moins qu'il ne

soit vendu à la charge de son bail, savoir, un bail passé à Napierville devant M^{re} A. Barrette, notaire, le 29 novembre 1878, par lequel le défendeur loua à l'opposant pour huit années à compter de la date du dit acte, l'immeuble saisi en cette cause, lequel bail a été enregistré le 30 novembre 1878, au bureau d'enregistrement du comté de Napierville.

Attendu que le nommé Octave Pinsonneault, s'instituant opposant afin de conserver, conteste la dite opposition afin de charge en autant que le dit bail ne forme pas une charge sur le dit immeuble, et allègue qu'il est créancier du défendeur en vertu de l'acte de vente d'immeuble par le dit Pinsonneault au défendeur, passé le 23 de mai 1868, à St. Michel Archange, devant M^{re} Labelle, notaire et témoin, et en vertu du jugement obtenu par lui contre le dit défendeur, le 22 de novembre 1879, dans une cause mue devant la Cour Supérieure du district d'Iberville, sous le numéro 1881, pour la somme de \$500.00, étant les trois versements en capital de mille francs, ancien cours chaque, échus respectivement en mars 1877, 1878 et 1879, en vertu du dit acte de vente ;

Attendu que le dit opposant afin de charge répond au dit contestant qu'il est sans droit de contester la dite opposition, en autant qu'il n'est pas partie en cause ;

Considérant que d'après l'article 1663, l'acquéreur d'un immeuble loué ne peut expulser le locataire à moins de stipulation spéciale à cet effet dans le bail ;

Considérant que d'après l'article 2128, le bail excédant un an peut être opposé aux tiers s'il a été enregistré ;

Considérant que l'effet de ces dispositions est de faire du bail *une charge* sur l'immeuble loué, ainsi que s'exprimaient les codificateurs dans leur rapport sur ces articles, et qu'en conséquence la contestation du contestant et les conclusions prises par lui sont mal fondées ;

Mais attendu que sur permission de la Cour le dit contestant a amendé les conclusions par lui prises originairement et a pris des conclusions subsidiaires demandant que dans le cas où la dite opposition afin de charge serait admise, la vente n'ait pas lieu soumise à telle charge, à moins que bonne et suffisante caution ne lui soit fournie que l'immeuble sera vendu à un prix suffisant pour lui assurer le montant de ce qui

lui est dû, et attendu que la Cour a réservé d'adjuger sur les frais du dit amendement en même temps qu'au mérite ;

Considérant que le dit contestant allègue et fait voir par sa dite contestation qu'il est créancier pour la somme de \$1,500.00, savoir : \$300.00 en vertu du dit jugement, et \$1,000.00 pour les versements de 1880, 1881, 1882, 1883 et 1884 en vertu du dit acte de vente outre les intérêts au taux de huit par cent sur le montant de chacun des dits termes de paiement, à compter de leur échéance respective par privilège de vendeur avec hypothèque antérieure à la créance du dit opposant afin de charge, plus \$102.15 pour frais sur le dit jugement ;

Considérant que l'imposition de la dite charge aurait l'effet de léser les intérêts du dit contestant, déboute le contestant de ses conclusions principales, mais maintient ses conclusions subsidiaires ou additionnelles, ne maintient l'opposition afin de charge et n'ordonne la vente de l'immeuble saisi soumise à telle charge qu'à la condition que le dit opposant afin de charge fournisse au dit contestant bonne et suffisante caution sous un délai de quinze jours, que l'immeuble sera vendu à un prix suffisant pour lui assurer le paiement de ce qui lui est dû savoir : la somme de \$1,500.00 en capital et \$102.15 de frais, moins les intérêts sur les paiements à échoir, et à défaut par le dit opposant afin de charge de fournir le dit cautionnement sous le dit délai de quinze jours et ce délai passé, sa dite opposition sera renvoyée purement et simplement ; et adjugeant sur les frais, vu l'amendement permis et la réserve faite quant aux frais, a Cour condamnée le dit opposant afin de conserver et contestant, à payer les frais de contestation depuis la production de sa contestation inclusivement dans tous les cas, distraits à M. J. E. Robidoux, avocat de l'opposant afin de charge, les frais de la dite opposition afin de charge devant être pris sur le produit de la vente après paiement du dit contestant dans le cas où le dit opposant afin de charge fournirait le dit cautionnement, et le dit opposant afin de charge devant supporter les frais de production d'opposition dans le cas où il ne fournirait pas le dit cautionnement.

J. E. Robidoux, pour l'opposant.

Piché & Bureau, pour le contestant.

PROLIX JUDGMENTS.

We quoted last week the words of Chief Justice Sharswood with reference to opinions unnecessarily spun out. We now find the same point noticed in another quarter of the world, the English *Low Times* having the following remarks on the subject:

"Public attention cannot be too often or too pointedly drawn to the serious consequences which may, and often do, result from the too diffuse judgments of learned judges. How frequently does one hear, when the words of some learned judge are cited, that it was "only a dictum," or was not "necessary for the judgment," and therefore is not to be regarded as binding or to be taken into consideration in deciding the question at issue. A very remarkable instance of this has lately occurred. In the case of *Bradley v. Baylis*, 8 Q. B. Div. at p. 238, Lord Justice Brett is reported to have said: "But supposing during the qualifying year one of those lodgers leaves, and the owner thereupon (as he assuredly must) resumes the control over that unlet part; according to my view of the statutes, immediately by that act of his those people left in the house, who have been householders, become lodgers again." The question for decision in that case was whether or not the appellant "separately occupied a part of the dwelling house" within the meaning of the Parliamentary and Municipal Registration Act, 1878, and the Representation of the People Act, 1867, so as to entitle him to a vote. The case did not raise the point referred to by Lord Justice Brett in his judgment. During the recent revisions of the lists of voters considerable stress has been laid upon the judgment of Lord Justice Brett, and many objections have been made to the claims of occupiers on the ground that during the qualifying year, in consequence of some one room becoming vacant, the landlord has exercised such a control over the house as is referred to by the Lord Justice in his judgment. In one instance the objectors, not satisfied with the decision of the revising barrister, appealed to the court above (*Anckell v. Baylis*, Dec. 1), with the result that the objection was overruled, and the court held that the part of the judgment of Lord Justice Brett which was relied upon was not binding upon them, as it was not necessary for the decision of the question before the Court of Appeal.

Similar instances might be indefinitely multiplied, all arising from what we venture to think is a great mistake, namely, too great diffuseness on the part of learned judges in delivering their judgments. Whatever appears in a reported judgment of a learned judge is certain to be adopted and acted upon sooner or later; and it is a result which can only be deprecated and deplored when action is taken upon *dicta* to which sufficient consideration and attention may not have been given, or which, in cases where more than one judge is sitting, would not have been indorsed by the majority of the court had they constituted an opinion on the essence of the case. So long, however, as judgments are delivered which deal with assumptions and facts outside those before the court for decision, so long will general complaint be made, and that not without great and sufficient reason."

Of course, it must be borne in mind that there are cases where the opinion is necessarily extended to some length, *e. g.*, where a review of previous decisions is called for, and is of great value in explaining the judgment. The criticism of the *Law Times* is directed chiefly against the expression of opinions on points outside of the record.

NECESSARIES.

In *Conant v. Burnham*, Supreme Court of Massachusetts, November, 1882, it was held that the services of an attorney in prosecuting the husband upon a charge of assault and battery preferred by the wife, are not necessities for which she can charge him; for it is the duty of magistrates to prosecute such charges upon complaint made to them, and it is presumed they will do that duty. The court said: "There may be occasions when such services are absolutely essential for the relief of a wife's physical or mental distress. Suing out a writ of *habeas corpus* to deliver herself from unjust or illegal imprisonment, or to regain possession of her child, might under peculiar circumstances furnish illustrations of a strong necessity. Another illustration may be found in the circumstances of the present case. The husband had committed an assault and battery upon his wife, and had instituted against her a criminal prosecution, which, from her final acquittal,

may now be assumed to have been perhaps without just foundation. What was she to do? Is it to be held that the woman, ignorant of legal rules and methods of proceeding, without money or friends, not only deprived of the protection and aid of her husband, but encountering his active hostility, was competent to defend herself properly on her trial before a jury? This would be equivalent to saying that the law considers the assistance of attorneys of no value. This would not be consistent with the provision of the Declaration of Rights and of the statutes giving to every person accused of crime the right to be heard in his defence by counsel. Decl. of Rights, art. 12; Pub. St., ch. 200, § 4. In an indictment for murder, counsel are assigned to the prisoner by the court, under the provisions of Pub. St., ch. 150, § 19, and are expected to serve without pay, if the prisoner cannot furnish compensation; and no such prisoner has gone undefended on this ground. There is no provision of statute for assigning counsel to one indicted for a less offence. But if such assistance was of value to the defendant's wife and was necessary to her, no artificial rule of law should be interposed to prevent her from obtaining it, in the same manner as the law allows her to obtain whatever else may be absolutely necessary under such circumstances as may exist at the time. There is no hardship upon the husband in this case from the application of this rule; for by his own act he created the necessity which she was under, and he made no provision for supplying it. The defendant's counsel concedes that the plaintiff's services were as a matter of fact necessary. Recent English decisions fully establish the doctrine for that country, that legal services may fall within the class of necessities. *Ottaway v. Hamilton*, 3 C. P. Div. 401; *Wilson v. Ford*, L. R., 3 Ex. 63; *Stocken v. Patrick*, 29 L. T. (N. S.), 507. This court has heretofore held that a husband is not liable for legal services rendered to his wife in successfully defending her against a libel for divorce filed by him. *Coffin v. Dunham*, 8 Cush. 404. There are reasons peculiarly applicable in this Commonwealth to services in such proceedings, which do not apply to cases like the present. Under the laws and customs of this State we do not think that legal assistance was necessary for this woman in prosecuting her husband for

an assault and battery upon her. The complaint in such case may be made orally to the magistrate, who will himself reduce it to writing, issue a warrant, if it appears that an offence has been committed, and investigate the case. Pub. St., ch. 212, §§ 15, 29." To the same effect is *Grindell v. Godman*, 5 Ad. & Ell. 755. "To hold otherwise would be like compelling St. Lawrence's executors to pay for the gridiron on which he was roasted. I presume the true principle of this decision is that the indictment would be such a luxury to the wife's feelings as to take it out of the list of necessities."—*Humorous Phases of the Law.*

THE LATE BARON MARTIN.

Sir Samuel Martin, one of the Barons of Exchequer, died January 9, aged 82. The Right Hon. Sir Samuel Martin, son of the late Sir Samuel Martin, of Calmore, Londonderry, born in 1801, was educated at Trinity College, Dublin, entered at Gray's Inn in 1821, and afterwards at the Middle Temple; practising first as special pleader. After having been called to the Bar by the latter Society in 1830, he went to the Northern Circuit, and gained a reputation in Liverpool and other towns by the ability he exhibited in the conduct of cases. He married a daughter of Sir Frederick Pollock, the Lord Chief Baron, in 1843, was made Q.C., and at the general election in August, 1847, was elected in the Liberal interest at one of the representatives of Pontefract, which he represented till 1850, when he was appointed a Baron of the Exchequer, and shortly afterwards knighted. He resigned his judgeship at the close of the year 1873, and was sworn in one of the Privy Council. He rejoined the Bench of the Middle Temple in 1878.

GENERAL NOTES.

WANDA S., was born in Prussia, January 24, 1857, and remained in that country till August 25, 1879, when she married an Austrian citizen, and removed with him to Austria, and thereby became a citizen of that country. On October 19, 1880, she executed, at Prague, a bill of exchange. To a suit afterward brought on the same she pleaded minority. By the laws of Prussia majority is attained at twenty-one, by those of Austria at twenty-four. The Supreme Court at Prague decided that when a woman had become of full age and thereby *sui juris* in a foreign country, this was a personal right which was not taken away by her marriage to an Austrian citizen, whereby she herself became a subject of Austria, and that she must be deemed to remain competent to act in her own right. The Imperial Supreme Court affirmed this judgment, for the reasons therein stated. — *Vienna Juristische Blätter.*

The Legal News.

Vol. VI. JANUARY 20, 1883. No. 3.

RUSSELL & LEFRANÇOIS.

In the case of *Russell & Lefrançois*, (5 L. N. 81), the judgment of the Court of Queen's Bench has been reversed by the Supreme Court, Chief Justice Ritchie and Mr. Justice Strong dissenting. The Respondent had the opinion of seven judges in his favor, including the Chief Justice of the Superior Court, the Chief Justice and Judge Strong of the Supreme Court, and yet was unsuccessful. The winning party had in her favor the four (or at least three) junior Judges of the Supreme Court and the Chief Justice of the Queen's Bench, making five. (If the six judges sat in the Supreme Court.) The case involved the validity of a will depending on the sanity of the testator.

A QUESTION UNDER THE ENGLISH LICENSE LAWS.

The Sheffield Justices are said to have been greatly perplexed by a case which lately came before them. A sharp-eyed policeman having seen a young woman leaving a public-house with a small jug of beer in her hand, some minutes after lawful hours, the publican was summoned for infringing the law. His counsel pleaded that the beer was not sold at all, but was a free gift, and in that case no offence had been committed. The young woman was employed all day at the public-house, and took her meals there, returning home late at night. On this occasion she preferred to save her supper beer to carry back with her, and this formed the contents of the jug discovered by the policeman. It was scarcely attempted to be denied that this representation squared with the facts. Then arose, however, another question—should not the supper beer be considered a portion of the girl's remuneration, and therefore bought with the labour of her hands? In that event there would have been a "sale" in a certain sense, and as the liquid was carried away after hours, the offence would have been committed. On the other hand, it was argued that, even admitting the jug of beer to be part payment for services rendered, the transaction was com-

pleted at supper time. Besides, has not a publican the right to pay his employees at any hour, day or night? The magistrates, it is said, were so puzzled by these conflicting considerations that they let the defendant off, but saved their dignity by giving him "a caution,"—the caution, we suppose, being equivalent to the legendary verdict: "Not guilty—but don't do it again!"

THE OATH OF WITNESSES.

An opinion was delivered, Dec. 30, by Judge Briggs, in the Court of Common Pleas, Philadelphia, in which he held that atheists and all others who do not believe in a divine Being and divine rewards and punishments are incompetent to take oath in a court of justice. The matter was brought up on a motion for a new trial in the suit of *Lucas* against *Piper*, the ground for the motion being that Judge Briggs had admitted the testimony of Robert Becker, who said that though he believed in the Creator of the universe and in a supreme power which would punish him here for false swearing, he did not believe in God as commonly understood by the people, nor in a personal God, nor God as an entity. There was no other evidence in support of the objection to the witness. "Something more is required to render one competent as a witness," said the judge, "than a belief in a supreme power simply as a power or principle, which may be the resistless natural laws as exhibited by the motion and operation of the elements, and to violate which will surely bring punishment here to the transgressor. The belief required by our laws is a belief in the existence of an omniscient being, who will impose divine punishment for perjury either in this world or in the next. If the belief be short of this it falls under the ban of legal condemnation." After citing several authorities to sustain his ruling, Judge Briggs continued: "It hence follows that the faith of a witness should be a religious belief of some kind in the existence of an omniscient being who will reward and punish either here or hereafter for good and evil doings—a belief in a power as exhibited by the force of nature and calling it supreme, and yet to ignore that that power is the handiwork of the omniscient and omnipotent God, is totally insufficient to meet the law's requirements. Nor

is any advance gained by asserting that he who violates the law of nature will be punished, for admittedly such punishment will follow with unerring certainty. While the witness Becker said he believed in a supreme power that would punish him here for false swearing, he would not say that he believed that power was divine, and he totally denied the personality of God as generally understood by the people. With such a belief how can he be said to be in fear of divine punishment for testifying falsely? His belief being defective in this respect, it falls short of one of the legal requirements, which is indispensable to entitle him to be examined as a witness in the courts of this State. It follows that I erred in receiving his testimony, and that a new trial should be ordered."

PRIVILEGED CAUSES.

The Court of Queen's Bench (Appeal Side) has made the following order:—

1st. No application to have a cause declared privileged shall be entertained unless the factum of both parties be produced ready to be distributed to the Judges.

2nd. Privileged causes shall be placed first on the day list (*ordre du jour*) for hearing, provided a full day shall have intervened between the production of the factums and the setting down of the cause for hearing.

RIGHTS OF UNPAID VENDORS.

A question of considerable importance arose lately as to the rights of unpaid vendors, in respect of certain seizures upon the Hope estate. The case was submitted by consent to a Court of Counsel, the gentlemen named being the Hon. Mr. Badgley, late Judge of Queen's Bench, Mr. W. H. Kerr, Q.C., Hon. A. Lacoste, Q.C., Mr. W. W. Robertson, *bâtonnier*, and Mr. Geoffrion.

Mr. L. N. Benjamin represented the unpaid vendors, and Mr. J. J. Maclaren the creditors and trustees opposing claims of unpaid vendors.

Mr. Maclaren submitted the following argument:

In re A. & C. J. Hops & Co.

This firm suspended payment Oct. 16th, 1882, and offer a composition of 33½ or 40 cents on the dollar, dependent upon the decision of the arbitrators as to whether the claims of unpaid vendors to get back their goods or to obtain a preference on the proceeds are valid or invalid.

Ten unpaid vendors have seized. One of them, Ross, asks for a preference on the price; the others demand the resolution of the sale and also payment by preference if the goods are sold.

The goods claimed were sold during June, July, August and September last, the latest sale being September 9th. Delivery took place immediately after the sale in each case; in two instances, the goods were shipped from England in September, and arrived in Montreal on October 5th and 9th respectively. The first seizure was made on October 19th, the others on that and subsequent days.

The undersigned, on behalf of the ordinary creditors, submits that the unlimited right of dissolution and preference claimed by these unpaid vendors on all goods sold by them and in the possession of the insolvents at their suspension is unfounded; and that these privileges are lost by not having been claimed within 15 days of the sale.

First, as to preference on the proceeds. This is governed by Art. 1998, Civil Code, which says: "The unpaid vendor of a thing has two rights: 1. A right to revendicate it; 2. A right of preference upon its price. In the case of insolvent traders these rights must be exercised within fifteen days after the sale." Since the coming into force of our Code this has been part of our common law, independent of any Insolvent Act. Indeed, it is not taken from, and does not even agree with the Insolvent Act of 1864, which was in force when the Code was adopted. By sec. 12 of the Insolvent Act of 1864 the privileges of the unpaid vendor were restricted to 15 days from *delivery*; article 1998 is more strict, and limits them to 15 days from the sale.

"Insolvent traders" in Art. 1998 evidently means traders who stop payment and become insolvent independently of any Insolvent Act. The French version used the word "*faillite*," and s. 23 of Art. 17 says that when this word is used in the Code it means "*l'état d'un commerçant qui a cessé ses paiements*." This is the meaning of the word in the French Code de Commerce and that given in all legal dictionaries. In the English version of the Code the word "bankruptcy" is used in Art. 17, and "insolvent" in 1998, but the French version shows that they are synonymous. In the pre-

sent matter it is alleged in every suit that the firm are "traders," and that they are "insolvent;" so that the cases come literally under Art. 1998.

The equivalent under the French Code for the first part of our Art. 1998 is No. 2102, No. 4 of the Code Napoleon, and for the latter part, Art. 550 of the Code de Commerce. The former reads as follows: "2102. Les créances privilégiées sur certains meubles sont:..... 40. Le prix d'effets mobiliers non payés, s'ils sont encore en la possession du débiteur, soit qu'il ait acheté à terme ou sans terme..... Si la vente a été faite sans terme le vendeur peut même revendiquer ses effets tant qu'ils sont en la possession de l'acheteur, et en empêcher la revente, pourvu que la revendication soit faite dans la huitaine de la livraison, et que les effets se trouvent dans le même état dans lequel cette livraison a été faite."

Art. 550, Code de Com.: "L'Art. 2102 du Code Civil est ainsi modifié à l'égard de la faillite..... Le privilège et le droit de revendication établis par le No. 4 de l'article 2102 du Code Civil au profit du vendeur d'effets mobiliers ne peuvent être exercés contre la faillite."

Bédarride, Achats et Ventes, discussing this question of privilege, and that of dissolution of sale as affected by Art. 550 above quoted and the supplementary article 576, says: "No. 330. Le bénéfice de l'Art. 576 du Code de Commerce est acquis aux ayants droits dès qu'il y a déconfiture et cessation de paiements. L'absence d'un jugement déclaratif de faillite ne créerait aucun obstacle au rejet de la demande en résiliation. On le sait en effet: ce qui constitue la faillite, c'est la cessation des paiements que ce jugement ne fait que constater. Aussi est-il admis en doctrine et en jurisprudence que l'absence du jugement déclaratif ne lie en aucune manière les tribunaux civils ou criminels; ils peuvent et doivent au contraire appliquer les règles spéciales de la faillite lorsqu'ils reconnaissent et constatent la cessation de paiements. No. 331.—Sa déconfiture judiciairement déclarée ou non, ne laisse au vendeur que l'action en paiement du prix, et le soumet quant à ce paiement, à la loi que subissent tous les autres créanciers. Ces derniers pour déterminer ce résultat, n'ont à établir que la cessation de paiements en fait."

Article 2000 C. C., relates to the vendor's

privilege in ordinary cases, and does not affect the exceptional case of "insolvent traders" provided for by the last clause of 1998, and so cannot affect the present case.

Secondly. As to the right of dissolution of the sale. Under the old law this was co-extensive with and subject to the same conditions as the right of preference on the price. In ordinary cases the latter right was unlimited as to time except as affected by prescription; and the former likewise, so long as the property was in the hands of the purchaser.

Although our Code has no article corresponding to Art. 1634 of the Code Napoleon which in express terms provides for the dissolution of the sale in case of non payment, yet it is admitted to be part of our law by Art. 1543 C.C. which restricts its exercise to property in the possession of the purchaser, and it has been expressly sanctioned by our Court of Appeals in *Henderson & Tremblay*, 21 L. C. J., p. 24, since the Code.

It is to be observed that the question of insolvency did not come up in *Henderson & Tremblay*. It was not alleged nor proved, nor is there any allusion to insolvency in any way.

It is submitted that the restriction of the preference on the price in the case of "insolvent traders" to 15 days from the sale, operates as a limitation of the right of dissolution of the sale to the same period.

As will be seen from the above references the law of France on the subject under Art. 2102 C. N., No. 4, and Art. 550 Code de Commerce, differs from our law as established by C. C. 1998 only in this: that in France the preference on the price ceases with the delivery in the case of insolvent traders; here it ceases 15 days after the sale.

In France, be it remarked, there is nothing in either the Code Napoleon or the Code de Commerce, or elsewhere, expressly limiting the right of dissolution of the sale which is given by Art. 1634 without qualification to every unpaid vendor.

Yet it is conceded by every writer on the subject and by all the decisions of the Courts, that the taking away the right of revendication and of preference on the price accorded by Art. 2102, No. 4, after delivery in the case of insolvent traders, by Arts. 550 and 576 of the Code de Commerce has impliedly and necessarily had

the effect of restricting the right of dissolution of the sale within the same limits.

Laurent in Vol. 24, *Vente*, No. 336, after discussing whether dissolution of sale of moveables exists and stating that it is undoubtedly the law of France, says: "Le Code de Commerce déroge aux droits du vendeur lorsque l'acheteur tombe en faillite."

See 4 *Aubry & Rau*, page 399, sec. 356, and Note 29 to the same effect and for summary of authors and decisions.

Alauzet, Code de Commerce, in Vol. 8, p. 52, says: "En matière de meubles il est certain que la perte du privilège (de revendication) accordé au vendeur laisse intact entre ses mains l'action en résolution, autorisée d'une manière générale par l'article 1654 du C. C. Le Code de Commerce en prescrivant la revendication autorisée par l'article 2102, No. 4 Code Civil, a-t-il laissé subsister l'action en résolution qui en définitive amènerait au même résultat? La question a été décidée négativement." Note 2. "Paris, 24 août 1839 (§ 32-2-333), Limoges, 6 mai 1843 (§42-2-326), Paris, 8 août 1845 (§45-2-540), Rennes, 23 août 1847 (D. P. 49-2-111), Cannes, 3 Jan. 1849 (§49-2-640) et tous les auteurs."

3, *Massé, Droit Commercial*, No. 1830, p. 377, after saying that in case of insolvency the right of dissolution does not exist, states: "S'il pouvait y avoir quelques doutes sur ce point avant les modifications que la loi du 28 mai 1838, a apportées aux dispositions du Code de Commerce sur la faillite, ils disparaîtraient devant le nouvel article 550 de cette loi, aux termes duquel le privilège et le droit de revendication établis par l'article 2102, No. 4 du Code Civil au profit du vendeur d'objets mobiliers ne sont point admis en matière de faillite, et devant l'article 576 qui détermine d'une manière limitative les cas de revendication. Ces deux articles manquent sans doute de précision en ne parlant pas d'une manière expresse de l'action en résolution. Mais leur esprit, plus clair que leur texte, démontré d'ailleurs par la discussion qui en a précédé l'adoption, est manifestement de refuser au vendeur en cas de faillite de l'acheteur, toute autre action privative que l'action en revendication autorisée par l'art. 576, et conséquemment le droit d'obtenir par toute autre voie la restitution des objets mobiliers dont le prix ne lui a pas été payé."

In the case of *Thibault vs. Branson*, Paris, 24 août 1839 (Dallos J. G., No. 1041, note 2, p. 326) where Thibault maintained that as art. 1654 was not mentioned in art. 550, Code de Commerce, the right of dissolution still existed, the following decision was rendered: "La Cour considérant que l'art. 550, Code de Commerce, modifié par la loi du 28 mai 1838, prohibe en cas de faillite l'exercice du privilège et du droit de revendication établis par No. 4, de l'art. 2102 du Code Civil au profit des vendeurs d'objets mobiliers: Considérant que l'action résolutoire est implicitement comprise dans cette prohibition, qu'il est impossible de ne pas le reconnaître si l'on compare le résultat de cette action résolutoire au but que la législation a voulu atteindre," etc., etc.

A reference to the *Code Annoté* of Dallos, Art. 550 Code de Commerce, and of Sirey on the same article, and subsequent decisions reported in addition to those above cited by *Alauzet* and *Aubry & Rau* will give the cases on the point.

It will be seen that the French authorities are unanimous in holding that the restricting of the privilege on the price, and of the right of revendication by Art. 550 Code de Com. had the effect of likewise restricting within the same limits the right of dissolution of the sale, although neither Art. 1654 nor the right of dissolution is mentioned or referred to.

They are also unanimous in holding that mere cessation of payment by a trader without any proceeding in insolvency operates this restriction.

This being admitted, our Art. 1998, which is quite as comprehensive as Art. 550 Code de Com. should have the same effect after the delay therein mentioned, viz., 15 days from the sale.

If it is admitted that this delay of 15 days terminates both the right of preference on the price and dissolution of the sale, another question arises as to whether it runs from the date of sale alone, or from the sale and delivery; and if from delivery, whether in case of goods shipped from England, and under the circumstances mentioned in the papers in this case, it would run from delivery in England or completed delivery here. It is submitted on behalf of the creditors opposing the claims of the unpaid vendors in this matter that it runs from

sale, at least if the sale has been followed by delivery and the vendor has not availed himself of the right of stoppage *in transitu*. In the case of *Brown & Hawksworth*, 14 L. C. J. p. 114, under the Insolvent Act, 1864, when the right only ceased 15 days after *delivery*, the Court of Appeals held by a majority that this delay ran from the delivery in England, although the purchaser here stored the goods in a public warehouse, and not with his other goods in order to protect the seller.

In the cases since the repeal of the Insolvent Act of 1875, in which sales have been dissolved by our Superior Court, I am not aware of a single case in which this has been done where it has been opposed by creditors. Of course the insolvent purchaser has no right or interest to urge the claims of his other creditors. Cases prior to 1864 have no bearing; as before that date there was nothing corresponding either to section 12 of the Insolvent Act restricting the rights of unpaid vendors to 15 days from delivery, or to Art. 1998, limiting them to 15 days from the sale.

It is to be remembered that the common law is that creditors shall share *pro rata* in case of insolvency. If a creditor claims a privilege his right must be clear before it can be conceded.

In case of doubt the ruinous result to trade should also be considered.

It is unjust that a trader should be clothed with the insignia of ownership of a large stock, get credit on the strength of it, and in case of insolvency perhaps the whole of his goods be taken by unpaid vendors while creditors who had lent him money or sold him more saleable goods which had found purchasers would get nothing; their money having perhaps gone to the very creditors who now sweep away his remaining stock.

As *Troplong* says in *Privilèges & Hypothèques*, No. 200:—"Lorsqu'un marchand vend à un autre des objets destinés à entrer dans son commerce il sait que ces objets seront mis en circulation, et il n'est pas possible qu'il vende avec espérance d'exercer un privilège, puis-que le privilège ne peut avoir lieu qu'à la condition que la chose vendue est dans la possession de l'acheteur. Il sait aussi que le crédit faisant la base du commerce, les marchandises qui vont entrer dans les magasins de son acheteur appelleront la confiance; que le public

y verra une garantie et apportera ses fonds dans la pensée qu'un actif suffisant reposant sur ces marchandises et sur tout ce qui garnit des magasins répondra des sommes prêtées.

La cause du vendeur est donc effacée ici par celle du public, et la vente de ces marchandises est par elle-même exclusive de l'idée de privilège."

These considerations are applicable to a case like the present, and if there were a doubt as to the correct interpretation of Art. 1998, effect should be given to the manifest intention of the Legislature, which was to restrict the privilege of the unpaid vendor to the 15 days, and after that time to compel him to rank concurrently with the other creditors.

The arbitrators have given the following decision in writing:

1. That no right exists on the part of an unpaid vendor to revendicate under articles 1998 or 1999 of the Civil Code of Lower Canada, the whole or any portion of goods sold on credit.

2. They decide unanimously that no right exists on the part of an unpaid vendor to claim a right of preference upon the price of goods sold when more than fifteen days have elapsed from the date of the sale to the vendee, when such vendee is at the time of such sale or afterwards becomes an insolvent trader.

The Hon. Judge Badgley, Hon. A. Lacoste and C. A. Geoffrion consider that the words "date of sale" mean the date of the sale.

Messrs. Kerr and Robertson are of opinion that the said words "date of the sale" mean the date of the delivery of the goods.

3. They decide by a majority, the Hon. W. Badgley, W. Robertson and C. A. Geoffrion being of opinion that the right to dissolve the sale is only co-existent with the right of privileges in the matter of insolvent traders, and cannot be exercised at a later date than fifteen days from the date of sale.

Messrs. Kerr and Lacoste are of opinion that the right to dissolve the sale is not limited to fifteen days after the sale or delivery, and continues so long as personal recourse against the vendee for the price can be exercised.

The mediators are unanimously of opinion that where the *action résolutoire* exists it may be exercised *quoad* any portion of the goods remaining in the possession of the vendee, and may be accompanied by a *saisie conservatoire*

to preserve those goods pending the action ; that in the event of but a portion of the goods being recovered under the *action résolutoire*, the unpaid vendor can rank only as an ordinary creditor for the value of the goods which have not been restored to him, he re-paying to the estate the amount of freight and charges expended by the insolvent or the estate upon the goods so restored to the unpaid vendor.

W. BADGLEY,
WM. H. KERR,
W. W. ROBERTSON,
A. LACOSTE,
C. A. GHOFFRION.

Montreal, January 13th, 1883.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, JANUARY 31, 1882.

Before JOHNSON, J.

EAST HAMPTON BELL CO. v. GROSE.

Procedure—Failure to put in security for costs.

An action will be dismissed for failure to comply with an order to give security for costs, notwithstanding that the case was only returned for the costs.

JOHNSON, J. On the 16th December, the plaintiff having returned this action into Court, was ordered to give security for costs within 30 days ; and on the 19th of this month, the order not being complied with by the plaintiff, the defendant moved to have the case dismissed. It was answered by the plaintiff that the case was settled before return. Then why return it? For the costs I suppose. However that may be, returned it was, and a default entered against defendant who afterwards got leave to appear, and obtained this order for security.

I have nothing to do with what occurred before the 16th, the day of the judgment ordering security. That judgment has not been complied with, and the defendant is entitled to have his present motion granted.

Motion granted with costs against the plaintiff.

Macmaster, Hutchinson & Knapp, for plaintiff.
A. W. Grenier, for defendant.

SUPERIOR COURT.

MONTREAL, JANUARY 31, 1882.

Before JOHNSON, J.

LAUZON v. ROSS et vir.

DUFRENE v. ROSS et vir.

Illegal Arrest—Probable cause.

Where workmen were employed by one of the proprietors to pull down a building, and a co-proprietor, knowing the authority under which they were acting, caused them to be arrested on a charge of damaging property ;—held, that there was want of probable cause.

JOHNSON, J. These two cases are alike. Three workmen had been employed by a Dr. Thayer (who, in right of his wife, was co-proprietor along with the defendants in the two present cases—of some real estate in this city) to pull down a building. They were all three arrested at the instance of the defendants, and brought before a magistrate who discharged them, on a charge of unlawfully doing damage to property. And they then, each of them brought an action for damages laid at \$210. The first case came before Mr. Justice Sicotte, and he gave judgment for the plaintiff with \$25 damages, and costs as in the lowest class of action in this Court. In the two present cases which were heard before me, the Counsel for the defendant contended there was no evidence to show the workmen had authority from Thayer ; but the fact is alleged by the defendant himself in his protest served upon these workmen, that Mrs. Thayer was causing a portion of the property to be pulled down—i. e. that the men were working there by order of one of the co-proprietors. The defendant knew what these men were doing there ; and the charge he brought against them was without cause, and under a mere color of law. It was also contended that in the event of damages, the costs should be those of the Circuit Court, but that would be in effect to punish these men for the exercise of their right of action. I adhere to the judgment given in the other case ; and in these two I give \$25 damages and costs as in lowest class action in this Court.

Longpré & David, for plaintiff.

Kerr, Carter & McGibbon, for defendant.

SUPERIOR COURT.

MONTREAL, December 11, 1882.

Before DOHERTY, J.

OSHAWA CABINET CO. V. WASHBURN et vir.

Married Woman séparée de biens—Contract unauthorized by husband.

PER CURIAM. This is an action brought by the plaintiff against a married woman, separate as to property, who purchased a quantity of furniture from the Company, plaintiff. She did not pay for the furniture, and an action is now brought for the price. She meets this action by saying that she was not authorized to contract, and that the action cannot be maintained against her.

A married woman has the administration of her property, but she cannot bind herself without authority. If she could be held on a contract like this, her property would be liable to be disposed of, as a legal consequence of the obligation entered into. The Court, therefore, with some regret, is compelled to dismiss the action.

Kerr, Carter & McGibbon for plaintiff.

Davidson & Cross for defendant.

SUPERIOR COURT.

MONTREAL, Dec. 11, 1882.

Before DOHERTY, J.

MARTIN V. THE CITY OF MONTREAL.

Damages against City Corporation—Removal of name from list of voters.

PER CURIAM. This is an action of damages against the city. The plaintiff complains that in the year 1880 or 1881, although he had paid his taxes, no credit was given to him in the books of the Corporation, and a bailiff came down to his place of business and annoyed him a good deal; and further that his name was stricken from the list of voters. He now brings an action for a large amount of damages. The Court cannot commend the practice of suing for large amounts of damages in cases where there is often great difficulty in determining whether there is any right to recover even a dollar; it increases the costs enormously. The plaintiff here has made out a right of action. He has proved no special damage; but for the deprivation of his right of citizenship and of his vote as such, he is entitled to recover something.

Judgment for \$30 damages, and ordering defendant to reinstate plaintiff in his right of citizenship; costs as of the lowest class in the Superior Court.

Judah & Branchaud, for plaintiff.

R. Roy, Q.C., for defendant.

RECENT DECISIONS, P.Q.

Interest—Registration.—A vendor of an immoveable cannot sue hypothecarily to recover arrears of interest (beyond five years), whereof a memorial has been duly registered under the provisions of Article 2125 of the Civil Code. (Court of Review, Montreal, 31st October, 1882, Mackay, Papineau and Jetté, JJ., confirming judgment of Mathieu, J., Mr. Justice Mackay dissenting). *MacDonald vs. Lériger dit Laplante*, 26 L.C. J. 303.

CIRCUIT COURT.

The annual report of the business of this Court, in the Montreal district, shows that the number of writs issued during the year was 8,756, as compared with 7,410 in 1881, an increase of 1,346. The total number of judgments rendered in 1882 was 4,750, as compared with 4,403 in 1881, showing an increase of 347. The following figures give details of the business of the Court during the year:—

Judgments rendered during the year in		
	cases contested....	1,565
"	by default or <i>ex parte</i>	2,374
"	by the Clerk of the	
	Court out of term...	911
Total number of judgments....		4,750
Number of writs issued in the Circuit		
	Court	8,756
"	Over \$25	2,969
"	Under \$25	5,787
"	returned into Court..	5,251
"	cases contested.....	1,426
"	Defaults, in which defendant	
	did not appear.....	3,825
"	Saisie-revendications	67
"	Saisie-arreêts	160
"	Saisie-gageries	485

BAR EXAMINATIONS.

In the January examinations, out of the 21 candidates for admission to study, 10 were successful, and of the 39 candidates for admission to practice 27 were successful.

The following are the names of the successful candidates for admission to study :—Messrs. L. B. Fontaine, J. E. Taschereau, A. C. de Lery Macdonald, J. B. Laberge, W. H. Parent, L. N. S. Boisvert, Gustave Hamel, Charles E. D'Amour, R. J. Elliot and N. B. Archambault.

The following are the names of the successful candidates for admission to practice :—Messrs. R. Laurendeau, L. J. Papineau, M. J. E. Chagnon, Hon. H. Aylmer, R. St. Pierre, C. A. Chenevert, M. Goldstein, C. H. St. Louis, Delisle Danjou, A. Prieur, — Joly, Wm. J. White, — Lafortune, J. Crankshaw, — Holt, R. Dandurand, E. A. D. Morgan, T. Moreau, Joseph P. Roy, — Morency, — Baribeau, J. E. Héroux, Ald. Jeannotte, — Camyrand, — Desaulniers and — Lefebvre.

Mr. Laurence, of Sherbrooke, passed a very satisfactory examination, but the question as to the regularity of his clerkship has been reserved for the decision of the General Council.

The following questions were put to the candidates for admission to practise :—

1. What portions of English law have been successively introduced into this Province ; and when and in what manner ?

2. In what manner is property acquired ?

3. What was the mode of abintestate succession before the Code ? and what changes has the Code made ?

4. How many kinds of obligation are there, and how are obligations extinguished ?

5. When does matrimonial community of property begin, and when does it end ?

6. What does customary dower consist of, and in what manner is it preserved ?

7. How many kinds of partnership are there ? and define each of them.

8. To what extent is an agent entrusted with the possession of goods, or the document of title thereto, deemed to be the owner ?

9. In life insurance, what parties have an insurable interest ? and what is the consequence of a want of insurable interest ?

10. What are the privileged debts upon vessels, cargo and freight ?

11. Upon what can marine insurance be effected ? When and how can abandonment be made ? and what are the results of acceptance or non-acceptance of abandonment ?

12. What is the *Corpus Juris Civilis*, and what

are its different parts, and who are the principal jurists whose writings are found in it ?

13. What are the principal kinds of Roman will ? and from which of these is the modern will derived ?

14. Who are the persons that the criminal law considers incapable of committing crime ?

15. What facts constitute the offence of obtaining goods under false pretences ?

16. In capital felonies, how many jurors may be challenged without cause ? How many in felonies not capital ? How many in misdemeanors ?

17. How many kinds of preliminary pleas are there, and where do they lie ?

18. When may trial by jury be had in civil cases, and how many kinds of challenge are there in such cases ?

19. How many kinds of opposition are there, and what is the object of each ?

The examiners announced that all those who obtained one-third of the total number of marks would be admitted to the oral examination.

GENERAL NOTES.

MR. T. W. TAYLOR, Q.C., of Toronto, has been appointed a Puisné Judge of the Court of Queen's Bench, for the Province of Manitoba, in the place of Mr. Justice Miller, resigned.

THE divorce statistics of Maine for the past five years give an unpleasant picture of home life in that State. There have been about twenty-four hundred divorces decreed during the period in question, and thus nearly five thousand persons have been released from the bonds which were assumed with at least nominal solemnity. The ratio is probably one divorce to ten marriages in Maine. The ratio in Massachusetts in 1879, was one to twenty-one.—*Chicago Legal News*.

THE *Toronto Mail*, referring to the treatment of patients in the asylum for the insane in that city, says: "Over forty-two years have elapsed since the establishment of the asylum for the insane in this city, and during that time a complete change has come in the methods of treatment of the poor unfortunates confined within the walls of the institution. Then the straight-jacket was regularly employed for the restraint of the violent patient, whether really dangerous or not; now it is never used. A suicidal patient was then thrust into a padded room, now he is simply subject to a careful supervision, and all instruments by which self-injury could be inflicted are kept away from him. Instead of severe and painful restraint, strict watchfulness and unvarying kindness are employed, while concerts, dances, and dramatic entertainments are made the means of enlivening the long winter evenings, and croquet and cricket beguile the hours in summer. The present humane treatment has conduced to the recovery of large numbers of the unhappy people under charge."

The Legal News.

Vol. VI. JANUARY 27, 1883. No. 4.

GRANT v. BEAUDRY.

The appeal from the judgment of the Court of Queen's Bench, at Montreal (4 Legal News, p. 393), has been dismissed by the Supreme Court. The judgment of the Queen's Bench affirmed the judgment of Mr. Justice Mackay in the Superior Court (2 Legal News, p. 354).

The following appears in the *Montreal Herald* of January 12th:—

"Our special correspondent at Ottawa telegraphed last night to the following effect: The appeal in *Grant v. Beaudry* was dismissed to-day with costs. The judgment was upon the question of the sufficiency of the notice of action to the defendant in the first instance. In giving judgment the Chief Justice quoted authorities to show that the residence of the plaintiff or that of his attorney should be indicated in all notices of action against public officials. The Court had been asked to express an opinion as to the legality or illegality of the Orange Association in the Province of Quebec, but as no action could be sustained in this case because of the insufficiency of the notice any opinion the Court might express would be extra-judicial and unwarranted. Justices Strong, Fournier, Henry and Taschereau concurred. Mr. Justice Gwynne, while agreeing with the decision of his colleagues, censured the judges of the Court of Queen's Bench for exceeding their functions in giving their opinions upon the general question. They should, he contended, have confined their judgment to the points immediately at issue in the appeal."

"Censure" is a somewhat extraordinary expression to be used in this connection, and it is to be hoped that the special correspondent is in error. As to the opinion expressed by the Court of Queen's Bench upon the merits, it is to be remarked that all the evidence was before the Court, and our impression is that both parties were equally anxious for a decision upon the whole case, in order that further litigation might be avoided.

PROFESSIONAL FAME.

The fleeting nature of the great lawyer's triumphs is admirably depicted in the following passage (reproduced by the *Albany Law Journal*) which formed part of ex-governor Hubbard's eulogy on William Hungerford, and is printed in 39 Connecticut Reports:

"And now when I consider this long life closed—these many years ended of eminent labor in the highest ranks of the forum—and nothing left of it all but a tolling bell, a handful of earth and a passing tradition—a tradition already half past—I am reminded of the infelicity which attends the reputation of a great lawyer. To my thinking, the most vigorous brain work of the world is done in the ranks of our profession. And then our work concerns the highest of all temporal interests, property, reputation, the peace of families, liberty, life even, the foundations of society, the jurisprudence of the world, and as a recent event has shown, the arbitrations and peace of nations. The world accepts the work, but forgets the workers. The waste hours of Lord Bacon and Serjeant Talfourd were devoted to letters, and each is infinitely better remembered for his mere literary diversions than for his long and laborious professional life-work. The cheap caricatures of Dickens on the profession will outlive, I fear, in the popular memory, the judgments of Chief Justice Marshall, for the latter were not clownish burlesques, but only masterpieces of reason and jurisprudence. The victory gained by the counsel of the seven bishops was worth infinitely more to the people of England than all the triumphs of the Crimean war. But one Lord Cardigan led a foolishly brilliant charge against a Russian battery at Balaklava, and became immortal. Who led the great charge of the seven great confessors of the English church against the English crown at Westminster Hall? You must go to your books to answer. They were not on horseback. They wore gowns instead of epaulettes. The truth is, we are like the little insects that in the unseen depths of the ocean lay the coral foundations of uprising islands. In the end come the solid land, the olive and the vine, the habitations of man, the arts and industries of life, the havens of the sea and ships riding at anchor. But the busy toilers which laid the beams of a continent in a dreary waste are entombed in their work and forgotten in their tombs. Yet the infelicity to which I have alluded is not without its compensations. For what, after all, is posthumous fame to him who brought nothing into this world and may carry nothing out? The dead leave behind their reputations alike with their estates. A man may be libelled to-day as a

fool, fanatic, and a knave, and to-morrow his libellers sneak into his funeral procession, and the chief magistrate of forty millions of free-men begs the honor of two feet of space at his obsequies. It is the old story—the tax which posthumous fame so often pays for its title—a garret and a crust in life, a mausoleum and statue afterward. What avails it all? We may justly console ourselves with the reflection that we belong to a profession which above all others shapes and fashions the institutions in which we live, and which, in the language of a great statesman, 'is as ancient as the magistracy, as noble as virtue, as necessary as justice'—a profession, I venture to add, which is generous and fraternal above all others, and in which living merit is appreciated in its day, according to its deserts, and by none so quickly and so ungrudgingly as by those who are its professional contemporaries and its competitors in the same field. We have our rivalries—who else has more?—but they seldom produce jealousies. We have our contentions—who else has so many?—but they seldom produce enmities. The old Saxons used to cover their fires on every hearth at the sound of the evening curfew. In like manner, but to a better purpose, we also cover at each nightfall the embers of each day's struggle and strife. We never defer our amnesties till after death, and have less occasion therefore than some others to deal in *post mortem* bronzes and marbles. So much we may say without arrogance of ourselves—so much of our noble profession. No better proof and illustration can be found than in the life just closed—a life clear and clean in its aims—full of busy and useful labors—void, I dare believe, of offence toward God and man, and crowned in its course with that three-fold scriptural blessing—length of days, and riches, and honor."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

QUEBEC, October 5, 1882.

DORION, C.J., MONK, RAMSAY, TESSIER, & BABY, JJ.

AYOTTE (plff. below), Appellant, & BOUCHER et al. (defts. below), Respondents.

Succession—Acceptance—Fraud.

The acceptance of a succession by a person who is of age is not binding when such acceptance was the result of fraud.

In the circumstances of this case there was fraud (Dorion, C.J., and Ramsay, J., dissenting.)

The appeal was from a judgment of the Superior Court at Three Rivers, March 16, 1882.

TESSIER, J., rendered the judgment of the Court, which confirmed the judgment of the Court below (See 8 Q.L.R. 327, where the opinion is reported in full).

The CHIEF JUSTICE and RAMSAY, J., dissented. We now give the opinion of Mr. Justice Ramsay.

RAMSAY, J. The question raised by this appeal is as to whether the respondents have accepted the succession of their late father Dr. Boucher. The appellant contends that they have done so impliedly and expressly. First, that after their father's death, they continued to live in their father's house till the death of their mother, that in her lifetime they collected the debts due to their father, used the furniture, animals and money belonging to the succession as if they were their own. Under the evidence I think this is not made out. The children seem only to have done conservatory acts and those of administration, and this for their mother, and it does not seem that they have in any of these transactions taken the quality of heirs. C. C. 646.

Secondly, the appellant pretends that in a deed of cession they took the quality of heirs. This is admitted, but the respondents said that they were induced to do this by the fraudulent machinations of appellant. I don't think this is proved. The notary Gallipeau says they did not know the consequences of the deed, and that appellant did, and it seems likely enough that the appellant wanted them to sign the deed as an act of heirship; but I don't think this is fraud. Ayotte was not obliged to put them on their guard as to the legal consequences of their act, and it nowhere appears that he made any false or incorrect statement as to the facts. All they can say is that they were in error, but error is no ground for setting aside an acceptance of a succession. C. C. 650.

I am therefore to reverse.

Judgment confirmed.

Turcotte & Paquin, for Appellant.

Hould & Grenier, for Respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, November 24, 1882.

MONT, RAMSAY, TESSIER, CROSS & BABY, JJ.

REDFORD et al. (defts. below), Appellants, & LES
ECCLÉSIASTIQUES DU SÉMINAIRE DE MONTRÉAL
(plffs. below), Respondents.

Sale of immoveable—Warranty.

Redpath sold to appellants a piece of real estate. They paid a portion of the price, leaving \$20,000 secured on the property, payable in ten years, with interest. This balance Redpath gave to McGill College, and appellants accepted the transfer. Appellants then sold the immoveable to Burland, who bound himself personally to pay the debt, and the property remained hypothecated to secure the debt. Burland then exchanged the property with the Seminary for another property; and as the property coming from appellants was mortgaged as well for the balance of the original price (the \$20,000 made over to McGill College) as for the extra price Burland agreed to pay, Burland hypothecated to the Seminary the property they gave him in exchange. Burland then sold to Ross the property he had acquired from the Seminary. The Seminary became parties to this last deed, and discharged Burland of his personal liability to them, and accepted Ross in his stead. Subsequently the rights of McGill College devolved on one Cunningham who notified the Seminary of the transfer. Interest on the \$20,000 fell due, and as it was not paid by any of the parties personally liable, Cunningham sued the Seminary hypothecarily. The Seminary paid the debt, and were subrogated in the rights of Cunningham. They then sued the appellants who pleaded as an answer to the demand the discharge of Burland by the Seminary.

The question was as to the effect of this discharge.

The Court below (Rainville, J.,) held that the action of the Seminary should be maintained.

This judgment was maintained in appeal, Ramsay, J., dissenting on the ground that to maintain the action appeared to lead to a useless circuit of actions.

Judgment confirmed.

Girouard & Wurtels, for Appellants.

S. Bethune, Q.C., Counsel.

Geoffrion & Co., for Respondents.

COURT OF QUEEN'S BENCH.

MONTREAL, JAN. 20, 1883.

DORION, C.J., RAMSAY, TESSIER & BABY, JJ.

MINISTER AND TRUSTEES OF ST. ANDREW'S CHURCH,
MONTREAL, (defts. below), Appellants, and
BOARD FOR THE MANAGEMENT OF THE TEMPO-
RALITIES FUND OF THE PRESBYTERIAN CHURCH
OF CANADA IN CONNECTION WITH THE CHURCH
OF SCOTLAND, (plffs. below), Respondents.

Retrospective Legislation—45 Vict. (Can.) cap. 124.

Held, that the Act 45 Vict. (Can.) cap. 124, confirming and ratifying all acts and doings of the Board of Temporalities, since the passing of the 38 Vict., cap. 64, was sufficient to sustain an action instituted by the Board before the passing of the 45 Vict., and the Dominion Parliament had authority to enact said statute, although the Privy Council in England had by their judgment in Dobie & Temporalities declared the Board to be illegally constituted.

In this case the right of the Board for the Management of the Temporalities Fund to collect the amount of a mortgage dating back to the year 1860, was called in question. The action, it may be stated, was taken out after the judgment in the Superior Court dissolving the injunction in the Dobie case, but before the final judgment of the Judicial Committee of the Privy Council, declaring the Quebec Act 38 Vict., chap. 64, to be unconstitutional. (5 L. N. 58.)

The Court below maintained the action, whereupon the present appeal was instituted.

Macmaster, for the appellants, said the main pretension of his clients was this: The persons who call upon us to pay are not the persons to whom we owe the amount sought to be recovered. The indebtedness of the appellants, if any, was to a corporation created by an Act of the late Province of Canada (22 Vict., cap. 66), and the plaintiffs (now respondents) are not such corporation; but the persons now suing are a corporation existing and illegally administering, and constituted under an Act of the Quebec Legislature, 38 Victoria, which Act was illegal and unconstitutional, and could confer no right upon the respondents to collect the debt sued for, or to grant a legal receipt therefor. The validity of the Quebec statute had been contested before the courts in the

Dobie case, and a provisional injunction had been issued, restraining the present respondents from administering or acting as a Board. The Privy Council had declared the Quebec statute to be unconstitutional and *ultra vires*, so that the pretention of the appellants had been fully sustained.

Morris, for the respondents, submitted that the contract, which formed the basis of the action was made as long ago as 1860, and there was no question, therefore, as to the indebtedness. The right of the respondents to sue for the recovery of this debt was not dependent on the constitutionality of the Quebec statute, 38th Victoria—that was merely an amending Act, and the judgment by which it had been declared unconstitutional had the effect of leaving the original Act of incorporation still in force. It was from this original charter that the respondents derived their right. Being a duly incorporated body, they had a right to collect their debts and enforce payment of dues. It had been said that the respondents were restrained by an injunction from acting or administering as a Board; but the fact was that the injunction in the Dobie case was quashed by the judgment of the Superior Court before the present action was taken out. The injunction once dissolved, could not be restored by an appeal, and there was nothing to prevent the respondents from administering and collecting debts. The appellants had no right, by a plea to an action of debt, to criticise the election of the Board. Directors *de facto* are *prima facie* Directors *de jure*, and their receipt is a valid discharge. The only interest of the appellants was to pay to a party whose receipt would hold good. It was also submitted that by the by-laws, the respondents had a right to sue. The chairman holds office until his successors are legally elected. If the election under the Quebec Act of 1875 was invalid, the chairman was still entitled to administer, until a new and valid election had taken place. In conclusion, it was submitted that by a public Act of the Dominion Parliament, which had not been attacked, the proceedings of the Board elected in 1876 were ratified and confirmed. Therefore, the appellants in any case were not entitled to have the action dismissed. The judgment of the Court below should be confirmed, even if the costs were awarded against the respondents.

Some discussion ensued as to the effect of the

Dominion Act referred to (45 Vic. cap. 124) upon pending cases. Subsequently a re-hearing was allowed on this point, at which,

Macmaster, for the appellants, submitted:—The Statute of Canada 45 Vic., cap. 124, is not retroactive, saving as expressly specified. It does not reanimate the unconstitutional Act of Quebec 38 Vic., cap. 64; it merely confirms and ratifies all "acts and doings" of the Board and of the acting members thereof since the Act 38 Vic., cap. 64 was passed—"had thereunder"—that is, in virtue of 38 Vic., cap. 64. These "acts and doings" can only mean acts and doings contemplated by the provisions of the (unconstitutional) Act 38 Vic., cap. 64, such as the payment of a subsidy to Queen's College, the payment of increased allowances to ministers, &c.—provisions in excess of the terms of the original Statute 22 Vic., cap. 66; but the right to sue is not conferred by the unconstitutional amendment, and the present action could not have been instituted by virtue of its provisions. The suit is not therefore ratified and confirmed by the Canada Act 45 Vic., cap. 124. As respondents say in their factum, it is not from the amending Act, (38 Vic., cap. 64), that the respondents derive their right to hold property *and collect their debts*, but from their original charter." It is true that the right to sue is derived from the original charter; but the plaintiffs here attempting to collect are not the corporation created by the original charter with 38 Vic., cap. 64, superadded. The defendants do not owe respondents—whose head was lopped off by the decision of the Privy Council, and has not been restored by the recent Act (45 Vic., cap. 124) of the Parliament of Canada. They owe the old corporation. 1. The defendants owe to the old corporation (22 Vic., c. 66), and there is no privity of contract with the corporation suing. 2. The corporation created by 22 Vic., cap. 66, and 38 Vic., cap. 64, claim from defendants by the present suit. 3. Defendants say they do not owe this new corporation; that it is an illegal body; and that the judgment of the Privy Council in *Dobie v. Temporalities Board* annulled 38 Vic., cap. 64. 4. There is nothing in Statute of Canada 45 Vic., cap. 124, which revives the annulled Statute 38 Vic., cap. 64 and restores to plaintiffs the corporate character and qualities they assumed at the time they instituted this action. The new Canadian Statute is not retro-

active to the extent of re-establishing the corporation now suing.

Morris, for the respondents, said if the Court was against him on the merits, he did not rely upon the statute except to this extent, that the Court might confirm the judgment, and dispense the respondents from the necessity of bringing a new action. In that event, however, he did not pretend that the costs should be given in his favor.

RAMSAY, J. (dissenting.)—This action was brought for the recovery of a mortgage debt of \$1,000 and \$120 interest. The respondents acted under the authority of a statute of the Legislature of the Province of Quebec, which purported to authorize the formation of the Board, respondent, in a different manner from that settled by the original Act of incorporation. The object of this amendment was to enable a new body, to be called "The Presbyterian Church in Canada," being a union of certain Presbyterian Churches, under certain conditions, to take possession of the property formerly belonging to a body known as the Presbyterian Church of Canada in connection with the Church of Scotland.

The appellant pleaded that the plaintiff, respondent, was not the party to whom he was indebted, that the Act of the Province of Quebec in question, 38 Vic., c. 64, was beyond the powers of a local Legislature, and that, therefore, the Board respondent was not organized by law and could not recover.

There is no controversy as to the facts, it being admitted that the Board respondent was acting under the authority of the local amendment. Judgment was rendered on this issue on the 28th of April, 1881, after the judgment in this Court in *Dobie* and the Trustees, declaring that the Act in question was not *ultra vires*, and the judgment of the Court below was given in conformity with the opinion expressed by the majority of this Court in that case. Subsequently, the decision in the case of *Dobie* was reversed in the Privy Council, and the local Act in question was declared to be an Act beyond the powers of legislation conferred on local legislatures by the British North America Act. This is not denied, but respondent argues that appellant is the debtor of the Board, and that consequently appellant cannot incidentally raise the question of the legality of the organization of

the Board. The fallacy of this argument is plain. If the body respondent were the same body, and that the defect were only as to its proceedings, the principle invoked would be applicable and conclusive. But it is contended, and, I think, distinctly admitted, that the Board is improperly constituted, not only as to its individual members, but that it is a different body, avowedly acting in different interests, and in a capacity hostile to the real intentions of the body whose name it purloined. If we were to condemn appellants on this issue we should, in effect, say "you who are enjoined not to make or meddle with the temporalities of the Church of Scotland may compel a debtor to pay you." This seems to me to be an impossible conclusion. It is idle to say appellant had no interest to raise the question. Appellant had the most material reason for refusing to pay the wrong person, namely, to avoid paying twice. At the argument, however, another question arose, which had not been pleaded, or it seems contemplated, namely, that on the 17th May, 1882, more than a year after the rendering of the judgment in the Court below, Parliament passed an Act containing this provision:—

"1. Notwithstanding anything in the said Act of the late Province of Canada, relating to the said Temporalities Fund, or amendments thereto, all the acts and doings of the said Board, and of the acting members thereof, from and since the passing of the said Act of the Province of Quebec, thirty-eight Victoria, chapter sixty-four, had thereunder, are hereby ratified and confirmed, and the present acting members of the said Board are hereby authorized to hold office and administer the said fund according to the terms of this Act, until replaced by others elected hereunder.

The rule of the Roman law, as applying to the law-giver, is that he *ought* not to legislate so as to affect rights acquired in the past and so disturb existing legal relations. "*Cum conveniat leges futuras regulas imponere, non præteritis calumnias excitare.*" C. 10, 31, l. 65. For the judge it becomes a rule of interpretation of statutes, not to give a retroactive effect to the enactment so as to alter the legal position of parties as to rights acquired in the past. But this rule ceases to have its effect when it becomes clearly the intention of the legislature

to give a retroactive effect to a law of this character. C. 1, 14, l. 7. The passage to which I refer ends with these very guarded words, "*nisi nominatim et de præterito tempore et adhuc pendentibus negotiis cautum sit.*" That is, that the law must apply expressly to the bygone time and to pending transactions. It has been questioned whether this rule is binding, even in countries where the Roman law forms the basis of the law (Savigny, Pte. Int. Law, by Guthrie, p. 293), and in several countries, to avoid a doubt on this point, the non-retroactivity of the law is laid down as a fundamental principle of legislation. For instance, the Art. 2 C. N. declares: "*La loi ne dispose que pour l'avenir; elle n'a point d'effet rétroactif,*" and so also in Prussia and Austria (Savigny, Id. p. 295). I think the rule is different in England, and that the doctrine of the Roman law is precisely that which governs us. Hardcastle, p. 95, and authorities there cited, establish this proposition fully. I need hardly say that the effect of a statute belongs to the public law, and therefore is governed by the principles of English public law. See also the power of legislation of Parliament contrasted with the powers of Congress. (Wade on Retroactive Laws, §§ 4 and 5). As a general rule, in the United States laws divesting of vested rights are unconstitutional, and as a special instance of this it may be mentioned, that void judicial proceedings cannot be validated.* What it is pretended was done, therefore, by the Dominion Act in question, if attempted to be done by an Act of Congress in the United States, would produce no legal effect, however plainly expressed. With us theoretically it is different. This is probably an error in principle in our constitutional law, but it is a curious evidence of the immense influence of the Roman Law on the common law of England. The real principle, that which has governed the legislation of France, Austria, Prussia and the United States, is laid down by a great writer in a work now little read:—"If laws do not aim at the good of those that live under them, they are laws only in name; in reality they cannot be laws." Dante, *De Monarchia*. Coke, who admits the general principle, is reported to have

said that if there was a monstrous and absurd law he would not put it in force. Practically, however, the result is not very different in England from that of other nations. They do not interpret the rule against retroactivity so as to deprive an Act of all kinds of retrospective effect. And we, while recognising the doctrine of constitutional writers who exalt the powers of Parliament, permit the Courts, by interpretation, so to read statutes that vested rights are not impaired. In *Gairdner & Lucas*, L. R., 3 App. cases 603, Lord Blackburn seems to have stated the English rule shortly and correctly. He says: "Where the effect would be to make that valid which was previously invalid, to make an instrument which had no effect at all, and from which the party was at liberty to depart so long as he pleased, binding—I think the *prima facie* construction of the Act is that it is not to be retrospective, and it would require strong reasons to show that it is not the case." This is pretty nearly the idea Coke meant to convey.

Now, what I think we have here to enquire is, whether there are such strong reasons in the present case. In pursuing the enquiry I would first observe that if the pretension of appellants be correct, the statute before us presents the most flagrant instance of an unjust law that could be imagined. It is not only a law passed to divest of a right, but of a right that had just been sanctioned by the Privy Council. Now, without attaching more importance than it deserves to the fact, that the decisions of the Privy Council take the form of a personal adjudication by the Sovereign, still it seems hardly possible to conceive that the Queen, Senate and Commons of Canada deliberately intended to ratify and confirm that which the Queen had, in the exercise of a constitutional and legal duty, declared to be invalid. Nor do I think the words necessarily imply such a construction. Parliament has ratified what the Board did from and since the passing of the local Act, that is in all effects after the passing of the Dominion Act, and therefore the Act goes on to confirm the appointment of the Board as it stood on the 17th May, 1872. There is not a word about giving a new effect to pending transactions, as required by the rule of Justinian's Code, and as is required by all the English cases. Thus it was held that a marriage contract made by

* See also Savigny Id. p. 357. This shows how odious it was considered to touch a legal proceeding terminated or not.

parol, without writing, before the 24th of June, 1877, the day the Statute of Frauds came into force, could not be affected by that Act, however general its terms were. Hardcastle, p. 196. Of course a different rule would apply in the matter of a will executed, but not come into effect, and a statute affecting wills generally would affect such a will for the reason given by the Master of the Rolls in *Haslock & Pedley*, L. R., 19 Ex. 273, (Hardcastle 207).

I therefore think that the action was bad when it was brought, and that as the statute does not expressly interpret the previous law and set aside the judgment of the Privy Council in so many words, but contents itself with ratifying and confirming the acts of the Board, as it must be supposed, for the future, we should reverse the judgment of the court below with costs. I stand, however, alone in this opinion, and the majority of the Court, recognizing the statute in question as an *ex post facto* law, shows such alacrity in welcoming this legislation, it will condemn the party who has been, by the Court's own admission, in the right all the time to pay his own costs. I cannot, therefore, use the deferential form of saying I regret that I cannot concur in the judgment. Of course, this remark only applies to the question of costs. As to the interpretation of the Act, that is a matter open to discussion, but on the other point I intend my dissent to take the form of a protest. I may add that I am also glad to remark that the majority of the Court is not agreed on this point, for I understand that Mr. Justice Tessier's opinion is that the appellants were not founded in their refusal to pay the respondent, even admitting that the Board was constituted on an unconstitutional law. This is the only point raised by the factums of the parties, and I have already alluded to it shortly. If I had supposed it had seriously gained the acquiescence of one of the judges I should probably have dealt with it more in detail. At the same time I cannot retract or modify what I have said on that point. I am to reverse with costs.

DORON, C. J., said that in 1875 two Acts were passed in Ontario and Quebec to alter and amend the Act which incorporated the respondents. The present Board were elected under these Acts. There was no other Board existing under the original Act. Therefore the

respondents were the only parties in possession of the property. The right of the Local Legislatures to amend the original Act was challenged, but was maintained both in Ontario and Quebec. The Privy Council reversed that decision, and declared that the Local Legislatures had no right to pass those Acts. Since then an Act had been passed by the Dominion Parliament confirming the authority of the Board, and ratifying their acts under the Quebec Act. Two questions now arose: first, had the Dominion Legislature a right, constitutionally, to declare that this action was properly brought? And, secondly, if they have such right, have they, in fact, so declared? It was a question of interpretation of the statute. Everywhere there is a supreme power which decides what is constitutional and what is not. In England it is the Imperial Parliament which is supreme. When it has once decided in clear and emphatic terms, no Court of Justice can touch the decision. In the United States the Supreme Court is the supreme power. Although the Supreme Court might give a bad judgment,—one that everybody would admit to be bad, and which might have been rendered by a majority of one—yet there is the limit of the Constitution, and what the majority holds, is constitutional. The Court has not to decide whether this is a moral law or not, but only whether the Dominion Parliament had a right to pass it or not. It is not enough to say that it trenches on private rights. The recent legislation on the Irish question trenches upon the rights of individuals. So our bankrupt laws trench upon the rights of creditors. We had an instance in the case of *L'Union St. Jacques & Belisle* where parties who had a right to a fixed allowance were deprived of that right by the Legislature. The case went to England, and the Privy Council held that these parties could be deprived of their stipulated allowance by an Act of the Legislature of Quebec. That was no doubt an Act of the most arbitrary kind. There was a still more extraordinary case a good many years ago. Mr. Donegani came to this country with a son, who was at the time a few months old, and had been born abroad. The father acquired considerable property, and died without making a will. The son thought that he was entitled to all his father's property. But the children of a younger brother, who were born in this

country, came forward and claimed the whole estate. Very reluctantly the courts held that under the then existing law respecting aliens, an alien was not entitled to take the property, and it must all go to the nephews. The case went to the Privy Council, and there the judgment was confirmed because the son was an alien. Twice the Privy Council maintained that the nephews were entitled to the property. And then, in 1849 or 1850, after twenty years of litigation, the Legislature of the late Province of Canada passed an Act relieving this young man from the disabilities of an alien, and gave him the property which would have been his by inheritance if he had been born six months later. All the costs were allowed out of the estate. In 1849 there were several good constitutional lawyers in Parliament, yet the statute was contrary to the decisions of the Privy Council. The present case did not approach the case of Donegani. There were also Acts passed at Quebec on two occasions, giving validity to the minutes of notaries who had died without having their deeds countersigned. These instances showed that the Dominion Parliament had the power to pass the Act in question. The Privy Council, moreover, held that the Dominion Parliament had a right to deal with the question. The Dominion Parliament have dealt with it. The law is not so carefully worded as it might have been; but the Court has to interpret it. His Honor read the Act, and expressed the belief that it covered the present case. There was a question as to costs. Under the circumstances, the judgment would be maintained with costs of the lower Court, but each party would pay their own costs in appeal.

BABY, J., concurred entirely in the remarks of the Chief Justice.

Judgment confirmed, Ramsay, J., dissenting.

Macmaster, Hutchinson & Knapp, for Appellants.

J. L. Morris, for Respondents.

GENERAL NOTES.

SERGEANT K —, having made two or three mistakes while conducting a cause, petulantly exclaimed, "I seem to be inoculated with dullness to-day." "Inoculated, brother," said Erskine, "I thought you had it in the natural way."

Nous avons appris avec regret la mort de M. Abraham Lesieur Désaulniers, doyen du Barreau des Trois-Rivières et ex-député du comté de St. Maurice à la Chambre Locale. M. Désaulniers s'est éteint dans sa 60ième année. Jusqu'au temps de sa dernière maladie il avait été un collaborateur assidu à la presse canadienne.—*La Minerve*.

A DANISH colonial magistrate, for whose exceptional character and ability we can vouch, once made a grimly comic experiment in this direction, and upon this principle: He was appalled by the endless perjuries committed in cases before him, determined to stop them, and did. He, of course, said nothing of his method, but an English friend seated beside him on the bench noticed that whenever a witness told a palpable lie he jumped. He asked the reason, and the magistrate, after a caution, revealed his secret. "My orderly stands behind the witness, and whenever I put my left hand to my ear, that indicates that the evidence is false, and he runs a pin into him." It is a well known fact to the many who will recognize this story that the "sting of conscience" in this material form proved effectual, and that the magistrate, who died honored throughout Denmark, in three years turned an Alestia into one of the most orderly and law-abiding of communities. He could always get the truth.—*London Spectator*.

GOOD RESOLUTIONS FOR THE NEW YEAR. (Copied surreptitiously from the Diary of a member of the Bar.)—

1. During the New Year not to lose any case; if it cannot be gained within the year, fight it over into the next.
2. When defeated don't lie down, but go up. If my client can afford to be beaten, tell him I can't.
3. Don't ask an adjournment for a reason that the other side know is a false pretext. Truth is the best policy, at least when the truth is known.
4. It is a good thing to have as many causes on the calendar as possible, even if there is nothing in them. It looks well, and keeps one's hand in.
5. Keep the diary full of entries, even if there is nothing doing. It looks busy.
6. When I go out to dinner or for a lounge with a cigar, always say I have gone to a reference. It keeps up respect and discipline in the office.
7. Always take two or three files of law papers in hand when walking through Nassau street or Broadway; it looks well. Never carry a book; it looks as if one hadn't all the law in his head.
8. When speaking of the judges to clients, always say "Old so and so." It impresses clients so favorably.
9. To get business, grab for it. Clients don't know whether to trust a lawyer till they see how hungry he is.

Query. Whether it is the best policy to make reasonable charges and build up a *clientèle*, or to take all I can get from each and then look out for a new client?

Query No. 2. Is it best in a doubtful case to engage senior counsel and succeed, or take the whole fee and run for luck?—*N. Y. Daily Register*.

The Legal News.

VOL. VI. FEBRUARY 3, 1883. No. 5.

TRIALS BY REFEREES.

Since the discussion by the Council of the Bar of the proposed amendments to the Code of Procedure in civil actions, other suggestions have been made that are worthy of careful consideration. A very important one is, to provide in particular cases, for the trial of actions by referees. It is proposed that any Judge of the Superior Court shall have power to refer the whole action, or any of the issues, for trial to a sole referee who must be an advocate.

This system of procedure has been in operation in the State of New York for many years, and it has commended itself alike to the Judiciary and to the Bar of that State, and has resulted in the formation of a class of referees who have made a specialty of referee trials, and to whom a multitude of cases of great importance have been referred by consent of parties, as well as by the Court of its own motion, which have been adjudicated upon, and the issues fairly and fully tried to the satisfaction of the Bar and suitors.

It would seem to have been designed to introduce this system into England as one of the legal reforms to be enacted by the Judicature Act of 1873, (copied also into the Ontario Judicature Act of 1881), but it appears by the judicial construction given to that Act in *Longman v. East* (3 Common Pleas Div. 155) that it had very serious defects, one of which was, that it so restricted the powers of the referee, that a reference, even by consent of parties, to try all the issues, was not authorized by the Act. It is not proposed to disturb existing references to arbitrators, experts and others; but in addition to powers already exercised, to allow any Judge of the Superior Court to confer temporary judicial functions upon a referee, who when selected by the Judge, must have some definite years' experience as an advocate; but who, when selected by the parties, must in any event be a member of the Bar, in order that some guaranty may be afforded that the referee selected is familiar with the rules of evidence and principles of law applicable in the trial of cases.

This mode of procedure is adapted to secure in the first instance, a more thorough and accurate trial of an action, where a number of items of account, or of damage or of other issues, have to be passed upon, the trial of which one by one, would, owing to the multitude of issues, consume more time than the Court could reasonably be expected to give with the pressure of a large calendar of causes before it. It also affords suitors a more expeditious and informal trial of their cases by enabling them to proceed at once, (even during vacation) without having to wait till the cause is reached upon the calendar. And in cases where the opinion of the Appellate Court would alone satisfy all parties, this system of procedure aims to have the cases presented by the referee in a proper condition for revision by the appeal court direct. If the referee should disregard the specific directions given him, he can be compelled, before judgment is entered upon his report, to amend it by stating his decision upon the issues and questions referred to him with such particularity and precision, that the Appellate Court would readily be able to review his decision as to the facts, and ascertain if his rulings and conclusions of law were correct.

In a late case in the Supreme Court of Canada, the Chief Justice took occasion to remark "that the Judge who tried the cause had left the Appeal Court in ignorance as to what facts he had found, that in England where causes are tried by a Judge without a jury, the Judge states his findings upon the facts and the Appellate Court can tell whether his conclusions of law were right or not." Also, in another recent case of an appeal from a decision in the matter of a contested account, judges of both Appellate Courts remarked, and some of them in very strong terms, on the confused and defective condition in which the case was presented to them owing to a mistrial of the case in the first instance.

The proposed amendment is calculated to protect suitors against the danger of such mistrials and to enable advocates to arrive at a clear and accurate trial of an action in the first instance, and in case of an appeal, it is designed to secure the Appellate Court an opportunity of getting an explicit presentation of the facts and questions for review.

In another issue we will give the rules suggested. D.

BUSINESS IN APPEAL.

The January Term commenced with 111 inscriptions, an increase of four on the September and November lists, the Christmas holidays not interfering with the advance of fresh cases. Twenty appeals were heard on the merits, besides one case submitted on the factums. There were also two Crown Cases reserved. Twenty-two judgments were rendered, of which four were in cases of the January Term. One of the reserved cases was also decided, and the other sent back for amendment.

NOTES OF CASES.**COURT OF QUEEN'S BENCH.**

MONTREAL, JANUARY 20, 1883.

DORION, C. J., RAMBAY, CROSS & BABY, JJ.

THE GRAND TRUNK RAILWAY CO. OF CANADA (deft. below), Appellant, and BREWSTER (plff. below), Respondent.

Sale of Immoveable—Hypothec not disclosed—Remedy of purchaser.

The purchaser of real estate who is not evicted nor disturbed in his possession, has no right to obtain the rescission of the sale by reason of certain undischarged hypothecs registered against the property (far exceeding in amount the whole capital of the purchase) and which were not declared to him in the deed, unless the vendor sold with a stipulation of franc et quitte.

The appeal was from a judgment of the Superior Court at Montreal, setting aside a sale made by the railway company to the respondent of certain lots of land situate in the village and parish of Longueuil. The judgment also condemned the Company to repay to the respondent the sum of \$6,667.50, as comprising the amount paid by the respondent on account of his purchase of the lots in question, and the value of improvements made by him on the property since the date of the purchase.

The ground on which the cancellation of the sale was demanded was that encumbrances for large amounts had been found to exist on the property. The respondent purchased the lots in question in 1872 for the sum of \$2,430, of which \$607.50 was paid in cash at the passing of the deed, and the balance of \$1,822.50 was

to be paid in four equal annual instalments of \$455.13 each. The sale was made with promise of warranty against all mortgages and encumbrances. The respondent after taking possession of the property so acquired by him built on a portion of it, and made various improvements, and sold portions of it. Since these expenditures and sales were made he had discovered that there existed two encumbrances on the whole property, of which these lots formed a part, namely, one in favor of the Seminary of St. Sulpice for \$100,000, and another in favor of the British American Land Company for a like sum of \$100,000.

The Company, by demurrer, pleaded that there was no allegation of eviction, nor did it appear that there had been any attempt to evict the present respondent from the property, and he was not entitled to ask for the rescission of the deed. This plea was overruled, as well as a second demurrer, setting out that the only conclusions which Brewster ought to have taken were that, in consequence of his being troubled, or fearing trouble from the hypotheca, he be authorized to delay payment of the balance until the vendors should cause the trouble to cease, or give him security against the same. The other pleas were also overruled, and the action maintained.

Macrae, Q. C., for appellant:—There is no clause of *franc et quitte* in the deed, and the respondent is only entitled to delay the payment of the balance until security against trouble is given him. Even if the action were held to be well founded, the amount awarded by the judgment is excessive.

L. H. Davidson for respondent:—Although it is true the respondent had the right to delay the payment of the balance of the purchase money, yet he has also the right to have the sale annulled and to recover damages. The former remedy would be of no benefit to him under the circumstances of this case, because it would not protect his improvements, and would not enable him to give a good title to others. The property would be left dead on his hands. The judgment annulling the sale was the only remedy which afforded the respondent redress.

DORION, C. J. The question in this case is whether the purchaser of real estate can demand the rescission of his deed of purchase, on the ground that the property is subject to hypothecs

which have not been declared by the vendor. The respondent, in 1872, purchased from the Grand Trunk Company certain lots of land situate in the village and parish of Longueuil. The price was \$2,430, of which \$607.80 was paid in cash at the passing of the deed, and the balance, \$1,822.50, was to be paid in four equal annual instalments of \$455.12 each. The deed contained a warranty against all mortgages and encumbrances. The respondent took possession and made improvements, and sold portions of the land. Some years after his purchase he brought the present action to resiliate the deed, on the ground that he had discovered the existence of two hypothecs for a large amount which affected the property so acquired by him as well as a larger extent of land. The action was maintained by the Court below, and the sale to respondent was annulled. The appellant complained of this judgment, on the ground that the respondent was only entitled to withhold payment of the balance of the purchase money until he was secured against trouble on account of these mortgages. The Code has made some changes in the law on this subject. The vendor now cannot sell property which does not belong to him, and the purchaser is entitled to have such sale annulled. It follows that any defect in the title, even before the purchaser is troubled, is a good ground for the resiliation of the sale. Where, however, the purchaser is merely exposed to be troubled by a hypothec on the property, he is only entitled to retain in his hands the price of sale, or balance of the price, until the vendor removes the hypothec or gives security, Art. 1535 is in point. Here there is no stipulation that the property is sold free and clear, but only the ordinary warranty against trouble. (His Honor then referred to the authors writing upon the provisions of the French Code, who all make the distinction between fear of trouble from hypothecs and defect of title.) It is a hardship perhaps to the purchaser of \$2,000 worth of property to find that it is affected by hypothecs to an enormous amount. But the purchaser in such case is not without remedy: he may obtain a ratification of title. If the mortgagees intervene, he can call upon the Grand Trunk to guarantee him against trouble, or to remove the hypothecs. The purchaser here did not adopt this course: he made improvements, and then asked to have the sale

set aside and to be paid for all his improvements. The law does not give him this right, and the judgment must therefore be reversed.

RAMSAY, J. This case is an action by the respondent to set aside the deed of sale of certain lots of land sold by appellants to respondent, for the sum of \$2,430, because the said lots were subject to an hypothec of \$200,000. The point submitted is very important owing to the voluminous commentaries on the alterations of the law in France under the Code, and I may add, by the able opinion of the learned judge in the Court below.

There can be no doubt that under our law before the Code an hypothec was not a *trouble de droit*, and no action would lie to set aside a deed of sale, because the property was hypothecated, unless there was the clause of special warranty, commonly called the stipulation of *franc et quitte*. But it is contended that this was a mere subtlety of the old lawyers, and that fundamental changes have been introduced by the Code which have necessarily abrogated the old law in this respect, or at all events warranted the introduction of what is contended to be a sounder doctrine, and that these changes are operated particularly by Articles 1065, 1492 and 1535 C. C.

As to the subtlety, it seems to me that the reproach may very fairly be retorted on the innovators. The old rule of law was laid down to check subtlety. Of course it is very easy to imagine cases of hardship under the old law, but they are not diminished or decreased by the rule now sought to be introduced. A title without any encumbrance is very rare, and a purchaser in bad faith might, in almost any case, stir up a very tangible defect in a title which really presented no practical danger. Therefore it was the old jurists said that the deed of sale, unless there were other words than the ordinary clause to *garantir contre tous dons, douaires, &c.*, only warranted the possession and enjoyment of the thing sold.

Troplong, with his usual facility, has undertaken to establish that the Code Napoleon has changed the old law. After invoking the forty years of social regeneration which had elapsed between the time Pothier wrote and the Code became law, the re-tempering of the law by the revolution, the necessity of contemporary interpreters, and the originality of the Code, he

proceeds to define the structure he proposes to demolish.

The least danger that seems to menace the world is the want of contemporary interpreters of the law. A more striking one is the deluge of words which envelope and obscure the simplest propositions. I trust we have not to make a profession of faith in the French revolution before we arrive at a conclusion as to the meaning of a text of Canadian law. The object of our investigation is to determine whether our Code by its terms altered the old law of France, and not whether Mr. Troplong and the writers who have followed him, have given a particular significance to similar terms in the French Code under the influence of revolutionary excitement.

The first part of his argument to which I must take exception is his assumed account of Pothier's doctrine. He says: "*Une des premières règles que je trouve exposées dans le Contrat de Vente de Pothier, c'est que le vendeur n'est pas obligé de rendre l'acheteur propriétaire.*" This is a totally disingenuous mode of stating Pothier's doctrine, which happens to be precisely that of the Roman law. What he explains in the amplest manner is, that this failure to make the purchaser proprietor is not that the vendor is to reserve the property of the thing sold, but that in case of attack he is only to defend the purchaser's title—in fact, to make it good. This principle is so manifestly reasonable that it has been impossible to eradicate it from the code, and where the most radical change is made, as in Art. 1487, it is immediately followed by an article declaring that the sale by the non-proprietor becomes valid by his becoming proprietor.

Mr. Troplong next finds the root of the change in the terms of Art. 1583 C. N. (See 1472 C. C.) It is not easy to find the cogency of this argument. Art. 1583 abolishes the necessity of tradition as between the parties. Our article, copied from it to some extent, goes a little further seemingly, but it evidently has the same meaning. He then goes on to say that Art. 1604 C. N., has changed the law, because it declares that, "*La délivrance est le transport de la chose vendue en la puissance et possession de l'acheteur.*" (1 Vente, p. 358.) Now, this, he says, is "*faux.*" It is certainly not a new mode of expressing what the law is, for

Troplong admits that the article is borrowed textually from Domat. We therefore come down to this, what is meant by having the thing in your *puissance et possession*? It is quite evident that the *Jour de Cassation* n'en déplaise à M. Troplong, to adopt his own sarcastic form, was quite justified in saying that the legislature having used the words of the old law, it was for the Court to attach to them the meaning the old law attached. This becomes more evident by referring to Art. 1603, C. N. "*Il (le vendeur) a deux obligations principales, celle de délivrer et celle de garantir la chose qu'il vend.*"

So far, then, there is no text of new law in France, but it is contended that Article 1653, C. N., shows that Troplong's mode of dealing with the other articles adverted to is alone admissible. It is said the law specially allows the purchaser to refuse payment of the price if there is *juste sujet de craindre d'être troublé, &c.* therefore there is the right to sue to set aside the sale, because the vendor has failed to perform an essential part of his bargain. Troplong does not go so far. (No. 614.) Bolleux does (5, p. 728), and if Troplong's argument is to be adopted as to the change of law, it seems hardly possible to stop where he does. But the general rule of interpretation is to restrict the exception to the case provided, so that if the argument of Troplong is bad without Article 1653, it is bad with it.

Whatever may be the view prevailing in France, here the jurisprudence is pretty fairly established by the case of *Talbot v. Beliveau* decided at Quebec in Review in 1876: of *Hogan v. Bernier*, in May, 1877; and of *Parker v. Felton*, in June of the same year.

The enormity of the amount of the hypothec affecting this property is insisted on in the judgment. It is evident that if the principle relied on be true, the right to have the deed set aside must exist the instant the hypothec exceed the unpaid price.

I am to reverse.

The judgment in appeal is as follows:—

"*Considérant que par l'acte de vente du 20 décembre 1872, consenti par la compagnie appelante à l'intimé, devant maître Théodore Doucet, notaire, l'appelante a vendu à l'intimé les lots de terre désignés au dit acte et en la déclaration en cette cause, avec promesse de le*

garantir de tous dons, douaires, substitutions, aliénations, hypothèques et autres empêchements quelconques, mais sans déclarer que les dits lots de terre fussent francs et quittés de toutes charges et hypothèques;

"Et considérant que lors de la dite vente il existait sur les dits lots de terre deux hypothèques qui avaient été enregistrées au bureau d'enregistrement du comté dans lequel sont situés les dits immeubles, dont l'une en faveur du Séminaire de St. Sulpice de Montréal, et l'autre en faveur de la compagnie connue sous le nom de British North America Land Company;

"Et considérant que lorsque l'intimé a porté cette action, il n'avait pas été troublé pour le paiement des dits hypothèques;

"Et considérant qu'en vertu de l'article 1535 du Code Civil, l'intimé, à raison du trouble auquel il est exposé par suite de l'existence des dites hypothèques, ne peut demander à différer le paiement de son prix d'acquisition jusqu'à ce que l'appelante ait fait disparaître ces hypothèques ou lui ait fourni caution;

"Et considérant que la clause de garantie contenue au dit acte de vente ne contient aucune stipulation contraire aux dispositions de l'article 1535 du Code Civil; et que l'intimé n'a pas le droit de demander la résolution du dit acte de vente à raison des dites hypothèques tant qu'il ne sera ni troublé dans sa possession ni évincé des dits lots de terre;

"Et considérant qu'il y a erreur dans le jugement rendu par la Cour de première instance le 28 février 1880;

"Cette Cour casse et annule le dit jugement du 28 février 1880, et procédant à rendre le jugement que la dite Cour de première instance aurait dû prononcer, renvoie l'action de l'intimé avec dépens tant en Cour de première instance que sur cet appel."

Judgment reversed.

G. Macrae, Q.C., for the Appellant.

L. H. Davidson, for the Respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, January 27, 1883.

DORION, C. J., MONK, TESSIER & BABY, JJ.

DOUTRE (deft. below), Appellant, and SHARPLEY et al. (piffs. below), Respondents.

Exemptions from seizure—Ball dress.

Held, confirming the judgment of the Superior Court (4 L. N. 185), that a ball dress is not exempt from seizure as coming within the designation of "ordinary and necessary wearing apparel." C. C. P. 556.

The appeal was from the judgment rendered by Mr. Justice Mackay in the Superior Court, May 28, 1881, a report of which will be found at page 185 of 4 L. N.

The case was submitted on the factums.

The appellant by her factum submitted the following argument:—

La cour inférieure a jugé *a priori*, qu'une robe de bal n'était pas un vêtement nécessaire ou ordinaire.

Est-ce là l'intention de la loi? N'est-il pas plus prudent, plus sage et plus rationnel d'examiner les circonstances qui entourent chaque cas particulier et de décider d'après l'examen des faits? Il va sans dire qu'une robe de bal, un habit de riche fourrure, etc., seraient des objets de luxe pour la classe ouvrière; ils ne seraient pas des vêtements ordinaires à cette classe; mais lorsqu'il s'agit de personnes occupant un certain rang dans la société, ces vêtements sont ordinairement en usage. Dans l'espèce, la véritable question est de savoir si une robe de bal est un article de toilette nécessaire à une personne du sexe qui vit dans un milieu social l'obligeant à porter une semblable toilette. Or c'est le cas ici, et cette distinction aurait dû apporter un tempérament au principe énoncé dans le jugement. Il est prouvé en fait par deux témoins (preuve qui n'a pas été contredite) que la robe en question était nécessaire à l'appelante, que c'est un article de toilette ordinairement porté par les dames de la position sociale de l'appelante.

The Court unanimously confirmed the judgment.

Laroau & Lebeuf, for Appellant.

Buller & Cooke, for Respondents.

COURT OF REVIEW.

MONTREAL, January 31, 1883.

RAINVILLE, JETTÉ, BUCHANAN, JJ.

ROSS v. DAME ANTOINETTE PRUDHOMME et vir.

Marchande Publique—Registration under C. C. P. 981—Penalty.

Held, that the penalty enacted by C. C. P. 981, with respect to married women carrying on trade

without delivering to the prothonotary and registrar the declaration therein mentioned, is not intended to apply to cases where a married woman is carrying on a petty business, with a stock of the value of a few dollars only.

The judgment inscribed in Review was rendered by the Superior Court (Loranger, J.), Sept. 30, 1882.

The action was brought under Article 981, C. C. P., against Dame Antoinette Prudhomme, of Longueuil, wife of Oscar Marion, cook, for the penalty of \$200, for failure to make the declaration as *marchande publique* required by the article above mentioned.

The defence was that the defendant was a poor woman endeavouring to support herself and four children, and merely kept a small fruit store, with a stock worth not more than \$5 or \$6; and that the present action was instituted maliciously by the plaintiff, and for the purpose of revenging himself for the loss of a suit.

The Court below dismissed the action, the reasons being as follows:—

"Considérant que la défenderesse faisait le commerce seul et pour son propre compte sous le nom de 'O. Marion,' et qu'elle n'était pas obligée de faire enregistrer la déclaration exigée pour le cas de sociétés ;

"Considérant que le commerce tenu par la défenderesse n'est pas contemplé par les dispositions de la loi qui exige la production et l'enregistrement d'une déclaration ;

"Considérant que l'action du demandeur est mal fondée ;

"La Cour déboute la dite action avec dépens, &c."

RAINVILLE, J., said this appeared to be one of the cases where the maxim *de minimis non curat lex* might be applied. The defendant had a small fruit and candy shop, the value of the stock being only \$10 or \$12. It was not the intention that the law which made registration compulsory on the part of married women trading, under a penalty of \$200, should apply to such cases.

Judgment confirmed without costs.

J. P. Cooke, for plaintiff.

Pelletier & Jodoin, for defendant.

CHANGES IN ENGLISH LAW.

The London Standard of Jan. 3, notices as follows two important changes in English law:—

Among the many legal reforms which became law on the 1st. inst., that of which the working effect will be most anxiously watched is the Married Women's Property Act, 1882. No piece of domestic legislation in modern times has ever effected such a sweeping change as this statute. It is not too much to say that it affects the whole community, since it alters the relationship between husband and wife, and does away with many of those old maxims of the Common Law which have hitherto been regarded as sacred. At Common Law a married woman had formerly no existence apart from her husband. She was incapable of acquiring, holding, or disposing, by will or otherwise, of any real or personal property whatever. She could neither sue nor be sued upon contracts entered into by her, for they were absolutely void; and it was her husband only who was liable for torts committed by her during marriage, or who could claim damages for torts committed against her. According to the doctrine of the common law, indeed, a woman's individuality became absolutely effaced by marriage, and she possessed, practically, no rights, and no liabilities. The courts of Equity, however, in order to protect the wife, invented the doctrine of separate estate, and from time to time various Acts were passed by which it was provided that any property could be settled upon a woman for her sole and separate use, and in such a manner that it should be absolutely protected from any interference on the part of her husband, whether with or without her connivance. Similarly, she was entitled, in certain cases, to dispose of her property by deed or will; her wages or earnings in any employment or trade in which she was engaged apart from her husband were declared to be her own property. She could effect an insurance upon her own life or the life of her husband for her separate use; she could maintain action in her own name for the recovery of her separate estate. Such, amongst others, were the rights of married women until Monday last, when the new statute came into operation. By this Act a wife acquires an absolute and uncontrolled power of acquiring, holding, disposing, or dealing with

real and personal property without any limitations whatever. She is, indeed, in exactly the same position, with regard to property as if she had no husband. In the same way she can enter into contracts and be sued upon them to the extent of her separate property, and, generally, legal proceedings may be taken against her alone, in all respects as if she were a *feme sole*. Again, if a married woman enters into any contract, in the absence of evidence to the contrary, she will by so doing bind her separate property, and not only that which she may then be possessed of, but also all that she may subsequently acquire. Further, if she carries on a trade apart from her husband she may be made a bankrupt—a provision which is of importance in defining her new *status*, although it is not entirely new. Thus, according to the custom of the city of London, which also obtained in a few other cities, a *feme covert* could trade on her own account, and be made a bankrupt. Again, if she were judicially separated from her husband, or if he were *civiliter mortuus*, or undergoing a sentence of penal servitude, a wife might have been subject to the bankruptcy laws, since she in these cases possessed certain powers of contracting. But with these exceptions the rule is new. It remains to be seen whether a married woman will be held liable to be committed to prison in default under the Debtors' Act—a contingency which seems to follow, as a matter of course, upon the change in her position. All women who marry subsequently to yesterday will be entitled to hold all property then belonging to or afterwards acquired by them as their sole and separate property, and, similarly, all property in future acquired by women already married will belong to them as if they were still single. An important provision of the Act is that relating to the deposits of married women in Post-office or other savings banks, its general effect being that, apart from all questions as to the date of the marriage, the fact of any deposit in any bank or any stocks or shares standing in the name of a *feme covert* is *prima facie* evidence that she is beneficially entitled thereto, and that she is empowered to give a good discharge for the same. The position of a husband and wife living apart is materially altered by this Act. They are placed in much the same situation as if they were strangers, and can take criminal

proceedings against each other for the protection of their separate property, and give evidence against each other. Many of the new provisions need to be judicially construed before their effects can be rightly gauged, but enough has been said to indicate that the law relating to the property of married women has undergone a most drastic reform, and, beneficial as may be many of the privileges which wives now possess, it is to be feared that the Act will be found to cut both ways.

Scarcely less sweeping are the general effects of the Settled Land Act. Briefly put, its object seems to be to give every limited owner in possession of land full power to deal with that land in every way, just as if he were a prudent and well-intentioned absolute owner in possession. At the same time, facilities have been given for making outlays upon the land, and the rights of persons interested in remainder, or otherwise, are by no means lost sight of. Many of the provisions of the Act have, it is true, long been customarily and voluntarily inserted in settlements, and the same powers which have frequently been exercised by trustees will in future belong to the limited owner in possession. Thus, a tenant for life may now sell a settled estate, or any part of it, or "any easement, right, or privilege of any kind over or in relation to it." He cannot, however, sell the mansion-house and its demesne without the consent of the trustees of the settlement, or an order of the court. Considerable difficulties exist in predicting the effect of a great part of the Act, since it is so worded that until judicial decisions have been given it will be impossible to say what limits there may or may not be to the rights and liabilities it confers and imposes. Again, the tenant for life may exchange the settled land, or any part of it, for other land, or he may concur in making a partition where it is held in undivided shares. He may also lease the land for any purpose—on a building lease for any term not exceeding ninety-nine years, on a mining lease for no longer than sixty years, and on any other lease for any term not exceeding twenty-one years. Further, a tenant for life impeachable with waste may, on obtaining the leave of the trustees of the settlement, or an order of the court, cut and sell "timber ripe and fit for cutting:" but it does not appear who is to decide upon what trees are to be

included under that term. Upon these lines are framed the powers which may be exercised under the Act, and the protection which is afforded to all persons entitled in remainder is, perhaps, scarcely commensurate with them. Thus the tenant for life must, before taking any such steps as those to which we have already referred, give a month's notice to each of the trustees of the settlement, and to the solicitor for the trustees—a provision which it has already been suggested will render it "a prudent precaution for trustees who wish to exercise with strictness their powers of supervision expressly to appoint from time to time a solicitor to be their agent to receive such notices." Again, the trustees may, if they differ with the tenant for life as to his mode of exercising his powers under the Act—a contingency which is certainly far from being improbable—apply to the court for directions. "Capital money" arising under the Act is to be handed over to the trustees or paid into court, according to the choice of the tenant for life, and stringent rules are laid down for its investment. The general purport of the Act is to defeat unreasonable settlements, and to take away the power which is often wantonly exercised of so tying up property that it becomes almost impossible to manage it advantageously. That there was urgent necessity for legislation in this direction is certainly true; but it is as yet too soon to predict that the complicated powers and restrictions which this Statute creates will work smoothly, and in any event it cannot fail to prove a fruitful source for litigation for some time to come.

LE MORT VIVANT.

A singular trial took place at St. Louis recently. It appears that a Mrs. Wackerle has been making claims upon insurance companies, pretending that her husband had been killed at Shreveport, La., by being run over by a train of cars. The Aetna Life Company after being sued on a policy and losing the case, discovered Wackerle, in life, in California, and obtained a new trial, at which his identity was proved and the jury gave their verdict for the company. The judge observed: "This testimony conclusively establishes that Wackerle, the identical person whose life was insured, is still living, and unmasks one of the boldest and most scandalous schemes of fraud upon the defendant, the court and her own counsel ever conceived and carried to the verge of success." But more recently Mrs. Wackerle sued the Mutual Life Company in St. Louis, and obtained a verdict. Mr. Wack-

erle was present in Court, and was identified by his brother and by scores of neighbours, but the jury, astute gentlemen that they were, evidently thought that they knew better. Wackerle might seem to be alive, but they determined that he was dead, and so the Company was condemned to pay Mrs. Wackerle upwards of six thousand dollars.

FLOWERY JUDGMENTS.

We propose to go to Georgia when the sober reason of our northern courts ceases to content us. Georgia is (or was) the home of Judge Bleckley, whose poetic effusion "*In the Matter of Rest*" is to be found on page 185 of our third volume. And Georgia, too, is the favored abode of another Justice—a Justice of the Supreme Court—who clothes an opinion, on a question of taking private property by the exercise of the delegated right of eminent domain, in the following glowing colors:

"Here is the home of a man venerable in age, in which he has resided with his family for thirty-eight years, planted by the side of the limpid stream, whose waters he utilizes as they flow. He has gathered around him by industry and toil the fruits and flowers of the season, the comforts and conveniences of a well-arranged and much-loved homestead. Around it cluster the memories of a life-time, treasured in common with those who have grown under his care from infancy to manhood and womanhood under its broad and protecting shadows. In it he was gently descending to old age, loving that quiet and seclusion to which the heart of the old so strongly cling. But the spirit of the age demands this homestead for its iron track upon which its iron steeds may travel to meet the alleged necessities of trade and travel, or to extend their corporate power and dominion. If the beauty of this homestead is to be invaded and marred, its comforts to be imperiled and its sweet quiet and seclusion to be broken upon with ringing bells, shrieking whistles and thundering trains—let the corporation, in the language of the Constitution, 'first pay adequate compensation to the owner thereof.'"

That a judge should have a turn for poetry is not surprising. Better judges than Sir William Jones have been devoted to it. But, in Georgia, apparently, some of the judges carry their poetic mood to the Bench. They cannot con the accustomed task, but like the urchin in "*The Schoolmistress*," their eyes stray from the prosaic brief to "the work so gay that on their back is seen." However, if judges give us poetry from the judgment seat they should not put us off with false coin. It is too excruciatingly charming to have the "iron steed" trotted out in a judgment. If these be the deliverances from the Bench what must the harangues at the bar be like?

The Legal News.

VOL. VI. FEBRUARY 10, 1883. No. 6.

GRANT v. BEAUDRY.

It appears that Mr. Justice Gwynne did say that the decision of the Court of Queen's Bench on the merits of this suit was "extra-judicial and unwarranted," and therefore the special correspondent was justified in saying that the learned judge had censured the Court of Queen's Bench. It is difficult to conceive expressions more offensive.

The effect of such a denunciation will probably, however, be less striking than Mr. Justice Gwynne expected. It will not hurt the reputation of that Court, and it cannot well hurt his. It suggests, however, two reflections. The first is, why so much passion? The decision of the Court of Queen's Bench only declares the Orange association to be illegal in the Province of Quebec; so that an Orangeman might sit in judgment in the case of *Grant v. Beaudry* without fear of recusation, provided he confined the demonstrations of his Orangism to the western bank of the Ottawa.

The second reflection is that in declaring that the decision of the Court of Queen's Bench, as to the merits of *Grant v. Beaudry*, was extra-judicial and unwarranted, Mr. Justice Gwynne blundered in his law, as is his wont.

The general rule is, that all the issues in a suit are within the jurisdiction of the Court. So even in the Roman law where the judge was charged by a formulary, he could go beyond it, with the consent of parties. Pothier, Pandectes. Bréard Neuville 3, p. 580. § *de re jud. l. 26*.

And it is only by exception that the Court abstains from exercising its full power. "*Cum multa sunt capita, non tenetur simul de omnibus sententiam dicere.*" *C. de sent. et interloc. l. 15*.

The Supreme Court was therefore acting within its right when it abstained from judging on the merits; but to say that it would have been extra-judicial to decide on the merits is simply nonsense.

As to the opportunity of deciding the question, since it was within the jurisdiction of the Court, it is unnecessary to argue. The parties desired it, the Court was fully prepared on the point, and since the Supreme Court has not ven-

tured to say the decision was wrong, it remains as a warning to the ill-affected—a warning, the good effect of which, the Supreme Court has had the tact to impair, if it has not had the courage to destroy.

R.

STRANGE TRANSLATIONS.

The laborious striving, on the part of certain French Canadians settling in the United States, after a literal rendering into English of their names, or, in some cases, the mere sound of their names, shows that their aim is to translate and not to change. A New York correspondent says he is acquainted with one Magloire Vincent who now rejoices in the appellation of "My Glory Twenty Hundred!" A Pierre Chabot has become "Peter Catshoe" (why not "Puss in Boots?"); Noel Vien subscribes himself "Christmas Coming"; Joseph March-terre is now "Joseph Sidewalk"; Noel Prairie is "Christmas Meadow"; Toussaint Coté, "All Saints Side"; Joachim Poulin, "Washington Colt"; Noel Trudeau, "Christmas Waterhole"; Jean Phaneuf, "Jack Makes-nine"; Vincent Archambault "Twenty hundred Arch in beauty." Magloire Benoit has evidently been hard pressed for a translation, and has turned his name into "My Glory by Night!", which sounds like a bad pun on his patronymic.

Mark Twain has recently learned, from a decision of the United States Circuit Court, that his *nom de plume* may be stolen with impunity. An author who does not protect himself by obtaining a copyright cannot complain if his books are republished with his own name or his *nom de plume* on the title page. Imagine the feelings of "My Glory by Night" if, having gone to bed in the happy conviction that he was the sole possessor of the name, he should wake up to find that somebody had arrayed himself in the borrowed splendour of a similar title!

THE TAKING OF EVIDENCE.

At a meeting of the General Council of the Bar, held at Quebec on the 2nd instant, it was decided to recommend to Government that regular court stenographers should be appointed at fixed salaries, and that a number of copies of the evidence should be made by means of type-writers for the use of judges and lawyers in appeal cases, these official stenographers to

be paid from a certain rate per folio collected by the prothonotary in each district. It was also recommended that the fees for admission to the study and practice of law be raised to meet the expenses of holding examinations, and for the more perfect organization of the Bar. The Council had an interview with the Hon. Mr. Mousseau, who promised to give the matter his attention, and to bring it before the House at an early date.

INSOLVENT ESTATES.

It is worthy of note that after nearly three years' experience without a Bankrupt Act, the Montreal Board of Trade continues to be opposed to legislation for the discharge of insolvents. But in abolishing the Insolvent Act in April, 1880, the Parliament of Canada omitted to make uniform provision for the equal distribution of the assets of bankrupt estates. The Montreal Board of Trade is seeking to elicit an expression of opinion on this subject, from commercial organizations throughout the country, with the view of submitting a Bill to Parliament. They say: "Since the repeal of the Insolvent Act of 1875 and amendments the mercantile community has had to depend upon the imperfect and widely differing systems for collection of debts prevailing in the different provinces of Canada. It is almost needless to add that the means provided by the provincial laws are most inadequate for the purposes contemplated by this board. It is believed the business men of the Dominion feel that in these circumstances a general and uniform law for the equitable distribution of the assets of persons who are no longer able to pay the full amount of their debts, and who are virtually at the mercy of the bailiffs of every creditor, is a pressing necessity." They expect that if there shall appear to be a concurrence of opinion in favor of an efficient measure that will provide an inexpensive method of distributing the assets of an insolvent among his creditors—a measure that will grant relief without encouraging insolvency—Parliament may be relied upon to give effect to the desire of the country. But they are careful to add that in asking for the enactment of such a measure, they are of opinion "that provision for composition and discharge of insolvent debtors should be left entirely at the option of the creditors, because it appears that only in this way is it

possible to avoid most of the complications incident to previous legislation on the question of insolvency."

SUPERIOR COURT.

MONTREAL, Jan. 31, 1883.

Before TORRANCE, J.

WRIGHT et al. v. GALT.

Lessor and lessee—Premises in unsafe condition—Resiliation of Lease.

Where the building leased was in a dangerous condition, and was sinking, owing to weakness of the foundation, and the Building Inspector of the city had condemned it as unsafe, held, that the lessee was justified in abandoning the premises, and was entitled to recover from the lessor all damages thereby suffered by him.

This was an action by tenant against landlord for resiliation of lease and for damages. The lease was made to plaintiffs as saloon keepers at \$15 per month for 21 months from the 1st August last. The plaintiffs complained that the building showed signs of tumbling down since 1st September, and on the 11th October the Building Inspector condemned it as dangerous; that owing to the original defects in the construction of the building and in the walls and foundation thereof, the plaintiffs' business and their use of the premises were interfered with to an extent causing them great damage. On the 30th October plaintiffs notified defendant that they would leave the premises on the 31st October, and tendered all rent to that date. The defendant joined issue with plaintiffs.

PER CURIAM. It is in evidence that the Building Inspector, Olivier Rouillard, condemned the building as unsafe and dangerous on the 11th October. He gave a notice in writing and swears that its statements are true. Walbank and Fowler, both architects, testify to defects in the foundations, but Fowler cannot answer the question whether they are dangerous. Simeon Lebeau, carpenter and contractor, also testifies to defects. On the other hand, Louis Bourgouin, Alex. C. Hutchison and Daniel Wilson, while they admit the defects, say that there was no danger. Walbank says that the building was considerably out of plumb. Fowler, examining the building at the time of the trial in

November, says that on the east side at the back it is three or four inches off the perpendicular, and in front seven inches off the perpendicular. John M. Lee said that in one part the wall leans seven or eight inches. The west wall bulged considerably. He would not like to live in the building. Galt, the lessor, examined as a witness, says the building was moved back two or three years ago. I must therefore say that the evidence of the witnesses is contradictory as to the danger of the building. But my attention has been particularly called to a protest by the lessor on the 17th October in answer to the protest of plaintiffs on the 14th October; the notary, speaking for Galt, there says that, whereas by their protest the plaintiffs pretend that the building "is in a dangerous condition (the cause being that a portion of the said building is sinking a little on account of the foundation not being strong enough), and that the said Wright and Bent (plaintiffs) require the said building to be properly repaired;" "wherefore I, the said notary, intimated to the said Wright and Bent that the said William Galt will have the said building properly repaired with all speed possible; that the repairs have already commenced to be executed by a competent builder; that proper props and supports have been put to the said building in order to secure the said building from sinking any more, or from suffering any further damage; that no danger is now to be apprehended from the actual condition of the said building, and that the said William Galt is ready to cancel the said lease immediately if the said Wright and Bent are agreeable and willing to do so; but if they continue on the said lease, they must accept and they will be considered as accepting and assuming all the risk of the said building, and of all the works which are required to be done and which will be done to the said building in order to put the said building in a good, strong and safe condition. . . . The said Galt pretends that the said Wright and Bent have not suffered any loss or damage of any kind on account of the actual condition of the said building, and that the said building is now safe from any danger whatever on account of the strong supports put up to the said building, &c." Here the lessees, plaintiffs, were told on the 17th October "they must

"accept and they will be considered as accepting and assuming all the risk of the said building and of all the works which are required to be done and will be done to the said building in order to put the said building in a good, strong and safe condition." I have said that the evidence was contradictory as to the danger, but the landlord here utters a warning, and the tenants may be held to have acted prudently in the abandonment. It is not necessary to await a catastrophe in order to prove a right. There is no question as to the obligation of the lessor to warrant a safe and peaceable enjoyment, which has been wanting. Therefore, the pretension of the plaintiffs should be upheld, and the inference follows that they are entitled to damages. The most serious items are the license, the fittings up and the profits. These damages are assessed at the sum of \$409.55.

Macmaster, Hutchinson, Knapp & Weir, for the plaintiffs.

Davidson & Cross for the defendant.

SUPERIOR COURT.

MONTREAL, January 31, 1883.

Before TORRANCE, J.

LAMBERT V. THE GRAND TRUNK RAILWAY CO. OF CANADA.

Railway—Horse killed—Proof of Negligence.

Where a horse was found dead near the railway track, and there was no evidence as to how he was killed, but it was proved that the fence adjoining the track was in good condition, and it appeared that people passing through the gate in the fence often left it open; held, that the company was not liable.

PER CURIAM. This is an action to recover the value of a horse alleged to have been killed on the 11th August, 1881, through the negligence of defendants, and their neglect in not keeping the fences separating the road from the land of one Isale Goyette in good order. The horse was found dead at the bottom of a culvert on the railroad. He had escaped from the field adjoining through a gate. There is no evidence of the train or locomotive having struck the horse or how he was killed. As to the condition of the fence through which the horse escaped from the land of Goyette, the evidence is conflicting, but the Court prefers the

evidence of the defendant's employees as more satisfactory. There is this circumstance testified to by several witnesses, that Isale Goyette, the proprietor, immediately after the accident, when asked to account for it, said that the fence was good and the gate was shut at night and found open in the morning, through which the horse escaped. It was a common practice for people passing through the gate to leave it open. It is a suspicious circumstance that the proprietor transferred his claim, six months after the accident, to the plaintiff, described as a clerk, and that there was no consideration given, and that they were to share in the proceeds if successful against the company. The action was taken immediately after the transfer. Why was the transfer made? Probably Isale Goyette, the assignor, had little confidence in his claim. There was a case of *Simard v. St. Lawrence & Champlain Railroad Company*, decided in appeal, 14 L.C.R. 406, which resembled this case in important respects. The Court here holds that the plaintiff has failed to establish his case.

Action dismissed.

Préfontaine & Major for the plaintiff.

G. Macrae, Q.C. for the defendant.

MASTER AND SERVANT.

LIABILITY OF EMPLOYER TO WORKMAN FOR INJURIES
RESULTING FROM NEGLIGENT PERFORMANCE OF
DUTIES WHICH THE EMPLOYER OWED TO THE
WORKMAN.

A correspondent asks us to publish the following judgment of Ross, J., in the Superior Court, Vermont, General Term, November, 1882, in the case of *M. R. Davis, Administrator v. Central Vermont R. R. Co.*—

Ross, J. The plaintiff's intestate, a locomotive fireman in the employment of the defendant, was killed December 10th, 1878, while discharging his duties in such employment. This action is brought to recover damages sustained by the widow and next of kin from the death of the intestate. The declaration charges that: on the above named day the defendant was operating the Rutland Railroad as lessee; that the intestate was in its service as locomotive fireman on its passenger train passing over the railroad; that thereupon it became and was the duty of the defendant to keep and maintain a sufficient and safe roadbed and track, and to

use due and proper skill and care in furnishing and maintaining a suitable and sufficient road-way for the passage of its passenger trains; and that the defendant so negligently and carelessly performed its duty in this respect that the roadbed became washed away and the intestate was thereby killed. This is the substance of the several counts in the declaration.

The evidence showed that the accident occurred near Bartonsville on the Rutland Railroad, and was caused by the washing out of a culvert. The plaintiff claimed and gave evidence from which the jury have found that the culvert was in an improper condition, resulting from the negligence and carelessness of the road master, bridge builder and section boss. The culvert had been washed out two or three times before. The last time before that occasioning the accident was by the freshet of 1869. It was then rebuilt by the bridge builder of the Rutland Railroad Company or of the trustees who were operating it, and the embankment over it was constructed by the road master of the same. The plaintiff claimed and gave evidence tending to show that, in constructing the culvert, the bridge builder carelessly and negligently obstructed it by constructing an improper stockade of piles on the up stream side to prevent the drift wood and brush from being carried into the culvert by the brook that flowed through it, and that the road master carelessly and negligently constructed the embankment above the culvert—and which was washed away on the occasion when the intestate received his injuries,—of loose and improper material. She also claimed and gave evidence tending to show that this defendant through its bridge builder and road master had carelessly and negligently allowed these defects to remain during all the years it had been operating the road, and also that its section boss had carelessly and negligently allowed the stockade to become partially filled and clogged so that it further obstructed the passage of water. The testimony further tended to show that the washout of the embankment above the culvert was occasioned by the stockade holding back the water so that it rose and ran over the embankment and washed out the loose and improper material of which it was constructed. It was not claimed by the plaintiff but that the defendant's bridge builder, road master and sec-

tion boss were ordinarily skilful and careful men in their several employments, nor that the defendant was guilty of any negligence in selecting and employing them. The plaintiff's evidence further tended to show that the defendant entrusted the construction and maintenance of all the bridges and culverts on that division to its bridge builder, and that the construction and maintenance of the track and road bed of that division was entrusted to its road master who had under him section bosses each of whom had a gang of section men and had under the road master the care of about five miles of the track and roadbed. The plaintiff in the trial court contended that the negligence of its bridge builder and road master in caring for the culvert and in failing to keep the same in proper repair, both in regard to the improper construction and continuance of the stockade and the embankment above it was in law the negligence of the defendant, and the County Court in substance so held and instructed the jury. The correctness of this holding and instruction is the principal question involved in the decision of this case. The other contentions of the defendant, that the declaration should have alleged, that it had notice of the defects in the culvert and embankment, and that evidence of notice to its bridge builder and road master of these defects was improperly admitted, depend upon whether the bridge builder and road master so far stood in the place of the defendant in regard to its duty and negligence to the intestate. That their knowledge of the defects and their negligence in regard thereto were in law the knowledge and negligence of the defendant. The defendant contends that the bridge builder, road master and section boss were fellow servants of the intestate in running its trains and operating the road, and that their negligence and want of care are not in law imputable to it, that it is not liable for the consequences thereof to the intestate or his representatives; and that the consequence of such negligence was one of the risks which the intestate assumed when he entered upon the employment. It relies upon the decision of *Hard vs. the Vermont and Canada R. R. Co.*, 32 Vt. 473. In the light of that decision it must be confessed that they were fellow servants with the intestate in the general work of operating the road. Since that decision was promulgated

the general subject of how far and when a master is liable to an employee for injuries resulting from the negligence of a co-employee has been often before the courts of last resort in this country and in England, and has been much considered and discussed. The conclusions reached have not been uniformly the same. The general principles underlying the determination of the duties and liabilities of the master and of the risks which the servant assumes by entering upon the employment, are very generally agreed upon.

Where the employment is hazardous it is very generally agreed, that the master assumes the duty of exercising reasonable care and prudence to provide the servant a reasonably safe place and reasonably safe machinery and tools to exercise the employment, and to maintain the place (track) machinery and tools in a reasonably safe condition during the time of such employment.

He also assumes the duty of exercising the same measure of care and prudence to provide suitable materials, suitable and sufficient co-servants to properly exercise the employment or carry on the business. Where this duty is discharged by the master, the servant assumes all risks and hazards attendant upon the exercise of the employment, or performance of the work, including those resulting from the negligence and carelessness of co-servants.

The diversity in the decisions has arisen in determining who are co-servants in the common employment, and whether the master is to be charged with the negligence of an employee who in some parts of the employment is discharging a duty incumbent upon the master. Some courts have held that the master is responsible for the negligence of a servant who had the right to command and did command an under servant who was injured in the performance of such command or order negligently given.

This distinction, however, is not now generally recognised, nor would it seem to be a proper application of the general principles which all agree, apply to the relation of master and servant in regard to injuries sustained by the latter in performing the service. The principal diversity in the latter decisions arises in determining the extent of the liability of the master for the negligence of his servant, which causes injury to another servant, alike perform-

ing a duty which by the relations of master and servant rests upon the master. The English Courts generally hold, that where the master has provided a reasonably safe place, machinery and materials in and with which the work is to be performed, but undertakes to keep the place and machinery in suitable repair through agents and servants, he has fully performed his duty when he has exercised reasonable care and prudence in selecting skillful and careful servants to detect defects and make repairs, and has supplied such servants with suitable materials with which to make such repairs, and that the master is not liable to another servant for any negligence of the first servant in detecting and making such repairs.

Wilson v. Merry et al., 1 L. R., (S. & D. Ap. 6) 326. In this case the Lord Chancellor states the doctrine as follows :—

"I do not think the liability or non liability of the master to his workmen can depend upon the question whether the author of the accident is not or is in any technical sense the fellow workman or *collaborateur* of the sufferer.

"In the majority of cases in which accidents have occurred the negligence has no doubt been the negligence of a fellow workman; but the case of a fellow workman appears to me to be an example of the rule and not the rule itself.

"The rule, as I think, must stand upon higher and broader ground. The master is not and cannot be liable to his servant unless there be negligence on the part of the master in that, in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business in place of being beneficial, might be disastrous to his servant, for the master might be incompetent personally to perform the work.

"At all events a servant may choose for himself between serving a master who does and a master who does not attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work is to select proper and competent persons to do so and to furnish them with

adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master, and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skillful and competent, who has formerly been but is no longer in the employment of the master, the master is in my opinion not liable although the two workmen cannot technically be described as fellow workmen."

This view places the liability of the master upon the duty he owes the workman arising from their relations to each other. It implies that if the master personally attempts to discharge that part of the work which the relation devolves upon him, and his negligence therein causes injury to the workman, the master is liable therefor.

The question is naturally suggested: Why should he not also be liable for the negligence of the agent or servant whom he has appointed to discharge the same duty in his stead although he has exercised due care to select a person competent and skillful?

Is such an agent or servant while performing the duty cast by the relation upon the master, a fellow workman with the master's servant in the employment, in such a sense that the latter cannot and ought not to recover of the master for injuries sustained through the negligence of the former? If so, the master who performs his part of the duty, as this defendant and all corporations must, by agents and servants, secures an immunity from liability which the master who personally enters the service to manage and direct the performance of the work does not enjoy.

The doctrine now established by the United States Supreme Court and by most of the Courts of last resort in the several States, holds the master liable to his workman for injuries sustained from the negligent performance of duties which rest by the relation upon the master, whether the master performs such duties personally or through an agent or servant.

Says Mr. Wharton in his work on Agency, p. 232:

"It is important. . . . to remember that the master is liable where the negligence of the offending servant was as to a duty assumed by the master as to working place and machinery.

"A master, as we have already seen, is bound when employing a servant to provide for the servant a safe working place and machinery. It may be that the persons by whom buildings and machinery are constructed are servants of the common master, but this does not relieve him from his obligation to make buildings and machinery adequate for working use. Were it otherwise, the duty before us, one of the most important of those owed by capital to labor, could be evaded by the capitalist employing his own servants in the construction of his buildings and machinery. In point of fact this is the case with most great industrial agencies: but in no case has this been held to relieve the master from the duty of furnishing to his employee, material, machinery and structures adequately safe for their work. He does not guarantee that either buildings, machinery or organization should be perfect, but he is bound by the rule *sic utere tuo ut non alienum ledas* to use such diligence and care in this relation, as is usual with good business men in his line. It is not enough for him to employ competent workmen to construct his apparatus. If an expert, he must inspect their work, and if not, he must employ another competent person as expert for the purpose. If such, however, is his duty he must not only see that the structure he provides is suitable at the outset, but that it is kept in repair. And the repairer's negligence in this respect is the master's negligence."

Says Mr. Pierce in his work on Railroads, p.370:

"The Company like any master is under an obligation to its servants to use reasonable care to provide and maintain a safe road bed and suitable machinery, engines, cars and other appointments of the railroad, and is liable to them for injuries resulting from the defects which it knew or ought to have known and could have prevented by the exercise of such care; and it is under the same duty and liability to maintain these instrumentalities in proper condition. The servant assumes the natural risks of his employment, but not those which the wrongful act of the employee has added."

The same doctrine was held by the United States Supreme Court in *Hough v. Railway Co.*, 100 U. S. 213, in which Mr. Justice Harlan reviews the authorities.

In a note the reporter has cited a long list of

cases sustaining the doctrine. *Holden v. Fitchburg R. R. Co.*, 129 Mass. R., 268, also found in 2 Am. and Eng. R. R. Cases 94, is a recent case on this subject, in which the Hon. C. J. Gray, of Massachusetts, ably reviews the cases, and states the same doctrine. The editor of the latter report, has in a note to this case collected a large number of American cases in which the same doctrine has been announced. When the case of *Hard v. The Vermont and Canada R. R. Co.*, *supra*, was decided, the liability of the master was held to be dependent upon whether the servant whose negligence caused the injury and the servant injured were fellow servants in a common employment or work. Making this the test for determining the master's liability, the reasoning and conclusions of the late Chief Justice Pierpont are unanswerable. But this test while determinative in a great number of cases as we have seen, has been abandoned both in England and in this country, and in lieu thereof the master's liability has been made to rest upon whether the negligence arose in the performance of a duty for the careful discharge of which he became responsible when he assumed the relation of master to the injured servant.

On these principles which, we think, furnish the true grounds upon which the master's liability rests, and on the American application of them, the charge of the County Court in the particulars to which exceptions were taken contained no error. The American doctrine, holding the master liable for the negligence of his servant while discharging a duty which the master owes to a general workman, is more consonant with reason and the general safety of the travelling public than the English doctrine announced in *Wilson v. Merry*, *supra*. The bridge builder and road master while inspecting and caring for the defectively constructed culvert were performing a duty which as between the intestate and defendant, it was the duty of the defendant to perform. Their negligence therein was the negligence of the defendant. Being the agents of the defendant for the performance of these duties, notice to them in regard to the defective construction of the stockade as affecting the safety of the culvert was notice thereof to the defendant. Hence the evidence to show such notice to them was properly admitted.

The declaration charged that the defendant was negligent in regard to the construction and repairs of the culvert.

This bound the plaintiff to prove such negligence: as against the motion in arrest of judgment, this was sufficient. It could not be negligent in these particulars, unless it knew through those on whom it had cast duty of inspecting and repairing the culvert, or ought to have known of the defects complained of.

The charge of culpable negligence impliedly charged the defendants with knowledge of the defects.

Nor do we think that the evidence showed that the freshet which washed out the embankment was as extraordinary as to excuse the defendant from liability.

It showed that the culvert was sufficient in capacity and construction, if it had not been for the improper construction of the stockade, to have discharged all the water that flowed in the brook on that occasion. Under the evidence it was clearly the duty of the Court to submit that question as it did to the determination of the jury. Hence the defendant's request, asking the Court to hold that the defendant was not liable on this account, was properly refused.

The judgment of the County Court is affirmed.

[See *Fuller v. Grand Trunk Ry. Co.*, 1 L.C. Law Journal, p. 68; and *Bourdeau v. Grand Trunk Ry. Co.*, 2 L.C. Law Journal, p. 196.—Editor Legal News.]

GENERAL NOTES.

Some idea of the enormous expense of the Belt trial can be formed from the fees paid to the defendant's three counsel alone. Mr. C. Russell's brief was marked 200 guineas, Mr. Webster's 150 guineas, exclusive of "refreshers," which were 50 guineas a day for the leader, 40 guineas for Mr. Webster and 20 guineas for the junior, to whom Mr. Webster paid such a flattering public compliment. The trial lasted forty-three days, and the aggregate fees amounted to 5,190 guineas. The jury, by arrangement, received one guinea a day.

The Cremation Society of England, which prefers to incinerate the remains of its members to committing them to the silent embraces of mother earth, is meeting with difficulties in carrying out its ends. When Sir R. Cross was Home Secretary, he informed the society that whether or not the law forbade cremation, the public interest required that it should not be adopted till many matters of great social import had been duly considered and provided for. Burial can be followed by exhumation; but the process of cremation is final, and this in the case of death by poison or

violence might tend to defeat the ends of justice. Sir R. Cross could not therefore acquiesce in the continuance of the undertaking of the society to carry out the practice of cremation, until Parliament had authorized such a practice by either a special or general Act. Sir William Harcourt more recently gave the same decision, so that for the present, and until public sentiment is considerably altered, the burial style now in vogue will continue in England.—*Mail*.

CRIME IN IRELAND.—The record of the past year is one which will be long remembered in Ireland. If the darkest time be before the dawn we have reason to hope that the sun is about to shine on that unhappy land. The record for 1882 contains twenty-seven strictly agrarian murders, chief amongst which were those of the Joyce family, five in number, slaughtered while asleep in their little cabin in the mountains of Maamtrasnna; of the two bailiffs of Lord Ardilaun (an old man and his grandson), who were shot dead when they went to serve eviction notices on tenantry dwelling near the shores of Lough Mask, Connemara, and whose bodies were then tied in sacks and sunk in the deep waters of the lake; of Mrs. Smythe, whose head was blown literally into fragments at Barbavilla, Westmeath, as she drove home from Church one Sunday afternoon in a carriage with her sister and her brother-in-law (a local landlord); of Mr. Walter Bourke (a landlord) and Corporal Wallace (one of Mr. Bourke's military body-guard), who were both shot dead in broad noon-day on the public road near Rapemane, Galway; of Mr. Blake (land agent of the Marquis of Clanricarde) and his servant man, who were both shot dead on the road near Loughrea, Galway; of Constable Kavanagh, who was shot dead at Letterfrach, Galway; and of Mr. Herbert, a grand juror, who was shot dead at Castle-island, Kerry. All these twenty-seven murders were assassinations, pure and simple, and in no case whatever could even the palliation be urged that death resulted as the consequence of a fight. The murderous design was always stealthily and deliberately carried into execution. In one instance in which a herdsman named Linnane, seventy years old, was shot dead while sitting at his fire-side at Milltown, Mally, Clare, because he had worked on a "boycotted" farm, the circumstances of the case were more than ordinarily mournful, for his son, who had been sitting at his side when the fatal shot was fired by the "Moonlighters" who attacked the house, lost his reason through his fright and horror, and died crazy some months afterwards. But besides this fearful catalogue of crime, in very few instances of which any one was brought to justice, were the startling assassinations of Lord Frederick Cavendish (the Chief Secretary for Ireland) and Mr. Burke (the Under Secretary for Ireland), on Saturday evening, May 6th, in Phoenix Park, Dublin. Then also frequent assassinations occurred in Dublin streets; these, though undoubtedly political, cannot be exactly classed with agrarian crime. In different parts of the city four informers were assassinated, and a police constable named Cox was shot dead while aiding in an attempt to arrest a party of armed Fenians, thus bringing the entire number of political and agrarian murders committed in Ireland during the past year up to thirty-four.

The Legal News.

VOL. VI. FEBRUARY 17, 1883. No. 7.

REVOCATION OF PARDON.

We notice a somewhat peculiar case in relation to the pardoning power, which has come up in Ohio. Gov. Foster recently pardoned a convict who had been sentenced to imprisonment for life for the murder of his brother. The pardon was granted on the certificate of physicians to the effect that the convict was in the last stages of a fatal disease, and would only get home to die. But the truth was that the man had cunningly deceived the doctors. He was carried out of the prison too weak to stand and scarcely able to speak. But he grew rapidly stronger when he was put into a conveyance to be taken home, and he recovered his full strength as soon as he had safely reached his journey's end. Gov. Foster, being informed of the facts, and finding that he had been made the victim of a trick, promptly revoked the pardon and had the man taken back to prison. Now the question has come before the Supreme Court of Ohio, whether the Governor had power to revoke the pardon. The case is a novel one, and has attracted considerable attention on the part of the bar. "An able Ohio lawyer" is said to have expressed the opinion that not only did Governor Foster do right in promptly revoking the pardon got under false pretences, but that there is no legal power anywhere to interfere with this vindication of justice.

COUNSEL FEES.

The question as to the right of action of a counsel for his fees was recently discussed before the Queen's Bench division at Toronto, in the case of *Hodgins v. Oille*. This was an action brought by Mr. Thomas Hodgins, Q.C., against certain members of the Reform Association of the county of Lincoln, to recover a large sum of money for professional services rendered as counsel in the Lincoln scrutiny case. The case was tried at Hamilton at the last Fall Assizes before Mr. Justice Patterson and a jury, and a verdict was given for the defendants. Last Michaelmas term, a motion was made to set

aside the verdict and for a new trial, but judgment was given, Feb. 6, by the Queen's Bench Division, sustaining the verdict and refusing to interfere. Mr. Justice Armour thought it a very doubtful question whether or not a counsel can sue at all for his fees, the chief difficulty being that it involved the correlative remedy by a client against a counsel for negligence.

ATTORNEY'S RIGHTS.

We notice that a question somewhat similar to one which has caused much embarrassment in our Courts, presented itself lately in Ontario. The point came up in Chambers before Mr. R. G. Dalton, Q.C., in a suit of *Leonard v. Leonard*. The action is one for alimony, and before trial the parties interested settled the suit, the wife agreeing to go back and live with her husband. The question then came up, who was to pay the costs of the plaintiff's solicitor. He failed to collect them from either party, and moved in Chambers for an order to compel the defendant, *i.e.*, the husband, to pay the amount. Mr. Dalton held that the request was not unreasonable, and that under the authorities he could make the order. This is said to be the first or one of the first decisions on the point in the Ontario Courts.

BLACKMAILING.

A clergyman of Brantford, named Beattie, has just suffered extreme annoyance and narrowly escaped utter ruin from the artifices of a plausible adventuress. This young woman, for a short time a member of his household in the capacity of companion to his wife (who is said to have been anxious to obtain grounds for a divorce), brought most serious charges against him. Too many are ready to credit such charges without proof, and the reputation of the clergyman was probably blasted in the opinion of thousands of the community, when the antecedents of the girl were exposed through the enterprise of the Toronto press. She had already stood the fire of cross-examination by counsel with the utmost coolness, but the revelations of her past life were so incredibly vile that she at once fled from the country. The *Mail*, referring to this case, and probably having in mind the measure noticed in 5 Legal News, p. 85, says: "Here we

have a salient proof of what would be the result, under more favourable auspices for the adventuress, if seduction were made a criminal offence. A designing woman, who desires to inveigle a man into marriage, or to extort money from him, could at any moment threaten to place him in the dock and send him to prison on her sole and unsupported evidence. Will anyone, in the light of experience, venture to declare such a measure prudent or safe? No one with a heart to feel for the unfortunate victims of passion can do otherwise than loathe the designing seducer of female virtue; but in the endeavour to reach him how many perils would be encountered by those who are innocent, or at the worst by those who are simply *participes criminis* in a common offence against good morals? To talk glibly about a 'permitted crime' comes easily to those who trade cheaply in platitudes. In most civilized countries jurists eminent for their talents and irreproachable in their zeal for purity have determinedly set their faces against an innovation they know, from painful experience, to be dangerous in the extreme. If you want to multiply Brantford scandals, and afford to designing women a wide sphere for the exercise of their peculiar talents, you have only to make seduction a criminal offence. The measure would properly be entitled 'an Act to facilitate the useful profession of blackmailing.'

TRIALS BY REFEREES.

The following are proposed amendments to the Code of Civil Procedure, referred to on page 33. They are based in part upon the rules which have been in force for nearly thirty years in the State of New York. They were presented by Mr. Pignolet to the General Council of the Bar at its last sitting, but too late for their consideration, and they are now published to afford the profession an opportunity of forming an opinion upon them:—

Any of the issues in an action, or the whole action, with all the issues of fact and questions of law involved therein, shall, by order of any Judge of the Superior Court at Chambers or in open Court, be referred for trial to any advocate on the consent of the parties, in writing, if the judge be satisfied that the issues referred are ready for trial as to all the interested parties. And such a Reference by consent shall be taken

as a waiver of the right to have such action or issues at any time tried by a jury.

Where all the parties have waived a trial by jury or none are entitled thereto, a Reference to try any of the issues or the whole action, with all issues of fact and questions of law involved therein, may be ordered by the court, or a judge, of his own motion, or on the application of any of the parties, to any advocate of at least ten years' standing at the Bar, not objected to on any reasonable grounds of recusation; in the following cases:—

First. When the trial may require the ascertainment of the correctness of many items of an account, inventory or schedule, or of many items of damage.

Second. When the trial may require the examination of many documents or papers, or where it may be required to ascertain the rights of claimants, on any partition of movable or immovable property, or to appraise a number of pieces of movable or immovable property.

Third. When the trial may require any local inspection, or an investigation by scientists or experts.

A joint Reference of two or more actions may likewise be ordered where the questions involved are alike in their material facts, and depend upon the same questions of law, if any delay or expense may thereby be saved to the parties interested, consistent with the ends of justice.

When the whole action, or any of the issues, is referred for trial, the Referee shall report to the Court in writing, his decision upon the whole action, or all the issues so referred to him, and upon the questions of law involved therein, stating explicitly all the facts found by him that are material to the issues involved, or that form the basis of his decision; and also his conclusions of law upon such facts, and recommend the judgment to be entered thereupon. He shall also report his decision on objections to the admissibility of evidence or to questions to a witness, with the exceptions taken to such decision and to his rulings on questions of law, and shall file with his report all the evidence taken by him. The attorney for either of the parties may, before the close of the Reference, submit in writing to the Referee, a statement of the facts which he deems established by the evidence, and the conclusions of law which he claims result therefrom; and also a statement

of the rulings upon questions of law which he desires the Referee to make, and the Referee shall note in his report his disposition of such proposed findings of fact and questions of law.

On an appeal from a judgment entered on the report of a Referee, or founded thereupon, in order to raise an objection to the report by reason of the neglect or omission of the Referee to pass upon any particular question of fact or of law, he must be specifically requested to do so by the party so objecting, and an exception must be entered in his report of his refusal so to do.

The trial shall be conducted as nearly as circumstances will admit in the same manner and on the like notices, and with the observance of the same rules of evidence and procedure as in the case of a trial by the Court. But all objections made by the admission of any evidence must be made at the time it is offered, and point out explicitly the grounds for its exclusion.

The Referee shall have the same power as the Court to administer oaths or affirmations to witnesses, and may in the name of the Court issue subpoenas for their attendance; and any of the parties may apply to the Court or a judge for such order as may be necessary for the compulsory attendance and examination of witnesses, and for the production of documentary evidence, and for such other order as may be necessary to insure the regular prosecution of the Reference and its expeditious termination.

When the whole action is referred for trial on the filing of the Report of the Referee, any of the parties may apply to the Court or a Judge for the homologation of the Report, and for judgment in conformity therewith, and such report shall be homologated and judgment directed to be entered in conformity therewith, without regard to the correctness of the determination of the questions or issues involved, which can only be reviewed by an appeal from the judgment entered upon the report. If the report appear to be defective by reason of the failure or omission of the referee to discharge his judicial duties, it shall be sent back by the judge for amendment. When such judgment shall be entered it shall stand as, and be deemed a judgment of the Superior Court, and the judgment and report of the referee may then be reviewed and an appeal taken therefrom, as from a judgment of a single judge of the Superior Court. When some of the issues only

are referred for trial, the court or judge shall on the coming in of the report, on his own motion or on that of any of the parties, if the report be not defective, adopt the report of the referee without questioning the correctness of his determination of the issues or questions referred to him, and proceed to the determination of the whole case and render judgment therein consistent with such report.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

QUEBEC, February 6, 1883.

DORION, C. J., MONK, RAMSAY, CROSS & BABY, JJ.

BOURGET, Appellant, and BLANCHARD,
Respondent.

Appeal from Q. B. to the Supreme Court—Review of order in chambers refusing leave to appeal.

The Court of Queen's Bench, or a judge thereof, has a right to grant or refuse leave to appeal to the Supreme Court from a judgment of the Q. B., and the decision of the one or the other is final.

An appeal to the Supreme Court will not be allowed where the interest of the appellant is less than \$2,000.

RAMSAY, J. (dissenting). The appellant applied in chambers to Mr. Justice Tessier to be allowed to put in security in appeal to the Supreme Court. This application was refused on the ground that the case was not appealable, and the application is now renewed before the Court. In the meantime the appellant applied to the Supreme Court for leave to appeal, but that Court refused the application on the ground that they had not jurisdiction; I presume, to order up a record without a security bond.

Two questions arise in this case, the first as to our jurisdiction, after the refusal of Mr. Justice Tessier to grant leave to appeal,—the second as to the nature of the judgment sought to be appealed, and whether the same be appealable or not.

The former of these questions has been argued as though the question was as to whether the Court could grant leave to appeal after it had been refused by a judge in chambers. It seems to me that the question thus nakedly put admits of no difficulty. But the real question is

somewhat wider. Sec. 31 (38 Vic., c. 11) is drawn in the untechnical manner with which we are so familiar. "No appeal shall be allowed until the appellant has given sufficient security to the satisfaction of the Court appealed from or the judge." Nothing more is said as to the allowance, by which I understand to be meant granting leave to appeal, but by the following section we are told that by the perfecting of such security the execution is stayed. That is, we are told that if the judge or Court is satisfied with the sufficiency of the security, its or his duty is to sign the bond. I see nowhere any jurisdiction given to decide as to whether the case is appealable or not. Now the first principle to be considered is, that the appealable character of a proceeding is matter of consideration for the Court to which the appeal lies. It decides as to its jurisdiction and giving the Court, whose judgment is appealed from, right to accord or refuse the appeal is abnormal. Such a power is sometimes expressly given by Statute but it certainly cannot be presumed. I fancy the practice which has undoubtedly prevailed, of looking into the nature of the appeal to the Supreme Court, has taken rise from the practice as to appeals to the Privy Council, and in what appears to me to be an incorrect interpretation of section 17. The proviso there, clearly applies to the limitation of the appeal by the Statute. Sec. 17 confers no powers on this Court. The duty of the Court or judge is to take the bond—a purely ministerial duty—and he has no discretion beyond judging of the sufficiency of the security. Having given a sufficient bond the appellant goes on at his peril. This view makes the decision of the Supreme Court, that they cannot allow an appeal, perfectly reasonable. It is plain that if the Court or a judge here had discretion to adjudicate as to whether a case is appealable or not, then by force of necessity the Supreme Court would be obliged to assume the power (though not expressly given) to examine the cause of our refusal, else we could defeat their jurisdiction; and thus bring about intolerable disorder. I think, therefore, the refusal to take the bond on the ground that the case is not appealable is wrong. The only words of the Statute that seem to war with this interpretation are the last words of sec. 28, "and obtained the allowance of the appeal." But I read these

words as referring to what precedes, and as though they were, and "thereby," i. e. by the giving the sufficient security.

It now remains to enquire if we can give a remedy. The only difficulty is the lapse of the 30 days, for it is evident that the refusal of one judge to take the bond cannot under sec. 31, preclude the Court from taking the bond, or indeed any other judge of the Court, within the 30 days. I do not however think the lapse of time fatal under the circumstances. The party seeking to appeal used all the diligence possible, and he cannot be made to suffer for what is no fault of his, and this on general principles. He would therefore be helped by the rule *sunc pro tunc*. But apart from this we have the statutory provision of sec. 26, by which on special application, notwithstanding the lapse of time, the Court or judge may allow the appeal on certain conditions. I think, therefore, we can give a remedy. But the second question then comes up, namely, the question as to whether the case before us is appealable or not. If I had an opinion to express I should probably agree with the majority of the Court. It seems to me that *la matière en litige* means the interest of the appellant. But as I have already said, I do not think it is our province to decide that question, and I am therefore of opinion that we should give the appellant leave to produce his security. In this opinion I stand alone.

The CHIEF JUSTICE, who gave the judgment of the Court, said that the Statute had always been interpreted to mean that the Court or judge could give or refuse leave to appeal, and that he found expressions in several sections of the Act which implied that the Court or judge had this power. Then there was another point, the Statute gave concurrent jurisdiction to the Court or judge, and as there was no right of appeal given from the judge to the Court the decision of the one or other was final. Were it otherwise application could be made to each of the six judges and then to the Court, and also after the appeal had been refused by the Court, application could be made to a judge, who might grant leave to appeal. The third point is that the case is not appealable. The interest of the appellant is a sum less than \$2,000.

Application refused.

SUPERIOR COURT.

MONTREAL, Feb. 12, 1883.

Before PAPINEAU, J.

LAMONTAGNE v. STEVENSON.

Quo Warranto—Board of Revisors—37 Vict. (Que.)

Ch. 51, S. 31.

The Superior Court has authority to issue a provisional order, on a writ of quo warranto, to prevent an illegal proceeding by a member of an inferior tribunal, such as the Board of Revisors acting under 37 Vict., (Que.) ch. 51, for the revision of the voters' lists.

In order to justify the substitution (under 37 Vict., (Que.) c. 51, s. 33), of another person for one of the originally elected members of the Board of Revisors, the member replaced must be dead or absent. Therefore the appointment of another person in the place of a member who is personally present at the meeting of the City Council at which he replaced, is illegal.

PAPINEAU, J. Le demandeur a pris un bref de *quo warranto* contre le défendeur nommé le 18 de Déc. 1882, pour former partie du bureau des réviseurs des listes électorales en remplacement du réviseur Brown qui avait été nommé à la session mensuelle du conseil de ville de Montréal tenue le 11 de Décembre 1882, mais qui venait de résigner à la séance du 18, et dont la résignation avait été acceptée par le conseil. Le *quo warranto* a été accompagné d'un ordre provisoire ordonnant au défendeur de s'abstenir d'agir jusqu'à nouvel ordre.

Le défendeur demande la révocation de cet ordre provisoire, attendu que les faits sur lesquels il croit que tel ordre a été basé sont mal fondés.

Les raisons pour lesquels le bref et l'ordre provisoire ont été demandés sont les suivantes :

10. Qu'à la séance du conseil de ville du 18 Déc. 1882, le réviseur Brown a été illégalement remplacé par le défendeur en vertu d'une résolution votée par 12 contre 7, pendant que cette résolution étant une reconsidération de la nomination faite le 18, ne pouvait être déterminée que par une majorité absolue des membres du conseil, et que ce remplacement n'a pas été fait dans un cas où la loi permettait de le faire.

20. Que le bureau des Réviseurs a commencé ses opérations le 5 de février, et qu'il les a continuées le 6 et le 8 de Février.

30. Que le défendeur persiste à siéger comme membre du bureau de révision frauduleusement

et contre les avis donnés par l'aviseur légal de la cité de Montréal.

40. Que le défendeur, même si sa nomination était légale, ne pourrait pas prendre part à la révision de la liste électorale après le 5 de Février.

Nous n'avons pour le moment qu'à décider si l'ordre provisoire pouvait être donné et s'il doit être révoqué.

Il n'y a pas de doute que dans le cas où un procédé illégal et injuste est sur le point d'être commis ou en voie de se commettre par un tribunal inférieur, la Cour Supérieure a le droit d'interposer son autorité pour l'empêcher.

Le défendeur dans le cas actuel agit comme membre d'un tribunal exerçant des pouvoirs limités à la révision des listes électorales. La Cour Supérieure a donc sur ce tribunal, comme sur tous les autres tribunaux inférieurs, un pouvoir de surveillance.

Ayant ce pouvoir elle doit l'exercer de manière à ce qu'il puisse être utile et non après qu'il serait devenu inutile ; de là son pouvoir d'arrêter par ordre provisoire un acte qui une fois fait ne pourrait pas être annulé par elle assez tôt pour empêcher les conséquences de cet acte.

Le cas présent est un de ceux où la décision finale du bref ne pourrait pas remédier au mal résultant d'une révision de listes par une personne n'ayant pas juridiction. Or dans la présente instance le défendeur n'a pas juridiction.

La sect. 31 de la 37^e Vict., chap. 51, donne pouvoir au conseil de ville à sa dernière assemblée mensuelle, chaque année, de choisir parmi une catégorie particulière d'échevins, cinq membres qui constitueront un bureau de réviseurs.

La section 34 dit, si un réviseur nommé en vertu des dispositions du présent acte refuse ou néglige de remplir un des devoirs qui lui sont imposés il encourra une pénalité de \$200.

La section 33 dit : " Survenant le décès ou l'absence pour cause de maladie ou autrement, d'un membre du dit bureau des réviseurs, le conseil nommera un autre réviseur à la place de celui qui sera ainsi décédé ou absent."

Brown n'était ni décédé ni absent à la séance du conseil où il a été remplacé le 18 de Déc. 1882, puis qu'il a lui-même offert sa résignation, et le conseil n'avait pas autorité pour nommer un autre réviseur.

Ce n'est pas le cas de maladie qui autorise le

conseil à remplacer un réviser, mais le cas de *mort ou d'absence*. La preuve constate que l'échevin Brown n'a pas été du tout absent.

La raison qui a fait émaner l'ordre provisoire subsiste encore, puisque le défendeur continue d'exercer des fonctions qu'il n'a aucun pouvoir d'exercer.

La demande de révocation est renvoyée avec dépens.

F. L. Beique, for plaintiff.

Lacoste, Q. C., and *Geoffrion*, counsel.

S. P. Lett, for defendant.

Maclaren, counsel.

SUPERIOR COURT.

MONTREAL, February 28, 1882.

Before JOHNSON, J.

PARHAM v. MARÉCHAL, and DAME A. PAILLEUR, collocated, and PLAINTIFF contesting.

Hypothec—Registration.

The defendant by marriage contract undertook to hypothecate the first land he might acquire, to secure to his wife the amount of dower stipulated in the marriage contract. He acquired land, and a creditor registered a judgment against the property. Subsequently notice was given to the Registrar by the defendant, that he had bought this land with a view to subject it to a hypothec for the amount of the wife's dower. Held, that the notice created no hypothec whatever, and the wife's claim to priority over the judgment creditor's registered claim was rejected.

JOHNSON, J. The plaintiff in the present case contests the report of distribution. He had judgment against the defendant, and executed it; and, upon the proceeds, the defendant's wife, Dame A. Pailleur, was collocated, by the 14th item of the Prothonotary's report, for \$361.15 on account of \$4,000,—amount of a conventional or prefixed dower stipulated by her contract of marriage of the 23rd December, 1866. The plaintiff contends that the party collocated had no hypothec on the land sold. By the contract of marriage there was no property hypothecated—but mention was made merely of an intention to hypothecate the first land the husband might acquire. On the 27th Nov. 1875, the defendant gave a notice to the Registrar that he had acquired the land of which the proceeds are now being distributed, with a view of having it subjected to the hypothec supposed to have been

created by the marriage contract. The prothonotary adopted the pretension thus made, and the question now appears simply this: Has the wife a prior hypothec to the plaintiff—he having registered his judgment long before the notice? In my view she has no hypothec at all. If she has, it must exist either under the marriage contract, or under the notice. The marriage contract mentions no property expressly, and the notice is not in authentic form; therefore, under articles 2040, and 2042 C. C., neither the one nor the other can constitute a hypothec. Contestation maintained with costs.

Taillon & Nantel for Dame A. Pailleur, collocated.

Macmaster & Co. for plaintiff contesting.

COURT OF REVIEW.

MONTREAL, February 28, 1882

TORRANCE, RAINVILLE, PAPINEAU, JJ.

THE CITIZENS INSURANCE CO. v. WARNER, and STEPHENS, opposant, and PLAINTIFF contestant.

License Act—Bar-keeper holding license—Proof of ownership.

Where a license to retail spirituous liquors was granted to a person who merely sold liquors as bar-keeper for another, held, that this was not a violation of the License Act, and that the owner might oppose the seizure of his goods when taken in execution under a judgment against the licensee.

The inscription was by the contestant on a judgment of the Superior Court, Montreal, Mathieu, J.

TORRANCE, J. Opposant claimed as proprietor the goods which had been taken in execution under a judgment against defendant. The latter was bar-keeper at the Ottawa Hotel which was the property of Stephens.

The license to retail spirituous liquors had been granted to Warner, and he sold them for Stephens.

The contestant contended that there was here a violation of the license law, A. D., 1878, and that Stephens could not make proof of his ownership because of this violation. The court below overruled the pretensions of the plaintiff.

We have carefully gone through the clauses relied upon by the plaintiff, S.S. 2, 3, 71, 78, 79

among others, but we fail to see any violation of law by opponent. The License Act said that the license should be given to a man having certain requisites. This had been complied with.

There was another point. There were a few dollars seized in the till, and a portion of them belonged to a cigar dealer and not to Mr. Stephens. But we are not informed how much. This portion plaintiff thinks should remain seized. We have no evidence enabling us to distinguish these moneys. Stephens is responsible for them and should hold them.

Judgment confirmed.

Trenholme & Co. for opponent.

Béique & Co. for plaintiff contesting.

COURT OF REVIEW.

MONTREAL, February 28, 1882.

MACKAY, RAINVILLE, BUCHANAN, JJ.

MCLEOD v. MARCIL *alias* MARSHILLE.

Revision on a question of costs.

The Court of Review will reform a judgment of the Court below which condemns the defendant to pay plaintiff's costs of enquête on a demand of plaintiff for damages which was overruled by the Court.

The inscription was by the defendant, on a judgment of the Superior Court, District of Richelieu, Gill, J., Nov. 11, 1881.

MACKAY, J. The plaintiff sued for \$305.25, and obtained judgment for \$107.63. In the \$305 were included \$197 for alleged damages caused by defendant to plaintiff.

The defendant admits that the plaintiff did the works for \$472.78 as alleged. There is no dispute as to that, nor as to what money payments the defendant made, to wit \$365.15, leaving a balance due to plaintiff upon them, "balance sur les travaux" the defendant styles it; but the \$197 damages have been disputed by a plea of general denial, and the defendant further sets up against plaintiff's demand, even for the work that he is admitted to have done, a claim for damages of \$147.50; in other words for \$39.87 beyond what plaintiff could possibly be found entitled to, even had he never asked any sum for damages.

The Court below has given plaintiff judgment for only the \$107.63, disregarding his claim for damages, disregarding also the de-

fendant's set off and claim for damages, putting the parties, as regards their several claims for damages, out of court; but it has condemned the defendant to costs, generally or largely; as, in ordinary cases, it is usually expressed, with costs against the defendant.

The defendant appeals to us: 1st, to be freed from the total of the plaintiff's demand, and 2ndly, subsidiarily to be freed at any rate from the costs of the *enquête* upon plaintiff's demand for damages; upon which part of plaintiff's case he has not succeeded. These costs are the costs upon nine depositions. The defendant says that he, who has not lost, has been condemned to pay these costs to the opposite party, who has not maintained his action in so far as claiming damages from the defendant.

We do not, generally, entertain appeals upon mere question of costs, yet now and then we have to, as in *Hall v. Brigham*,* and so has the Queen's Bench acted. In the present case we think that we may interfere; for the defendant is not, in one aspect, a losing party, and it is easy to distinguish what costs are appropriate to the condemnation of the defendant for the \$107.63 balance due to plaintiff *sur ses travaux*, and what costs plaintiff has been at urging his demand for damages, and resisting the defendant's. So we say that the defendant shall not be charged plaintiff's costs of depositions.

The judgment in revision finds the judgment *a quo* not erroneous in substantial, but only in so far as condemning the defendant to pay the total of plaintiff's costs, so that judgment is modified, and the defendant is freed from the costs of depositions of plaintiff's witnesses in the Court below; each party in revision to bear his own costs.

R. J. Cooke for plaintiff.

J. B. Brousseau for defendant.

GENERAL NOTES.

A correspondent writes of the new Law Courts in London: "I had a look over them yesterday, and found it easy to get inside the labyrinth of stairways and corridors with which the place abounds. But the getting out! I seemed to wander miles and miles. I went upstairs and downstairs with the perseverance of the knight in the nursery tale, who sought the lady's chamber. Past doors upon doors, and archways by the million (or thereabouts), did I tramp. Everybody seemed as lost as I was. Bewildered barristers were asking each other, and everybody else, their way to this or that set of chambers."

M. Fallières, le premier ministre français, est âgé de quarante-un ans. C'est un avocat du Lot-et-Garonne. Il est député depuis neuf ans seulement. C'est un orateur distingué. Il appartient au groupe de la gauche républicaine, et est traité de réactionnaire par les radicaux.

Judge Connor, of Cincinnati, has decided that public school-houses cannot be used as places of worship, and he issued a perpetual injunction against the school trustees of Symmes Township, Ohio, restraining them from allowing the school-house to be used for a Sabbath school or for religious services.

Delaware, after mature deliberation, has resolved not to abolish her whipping-post, which some regard as a relic of barbarism. Opinion on the subject of corporal punishment fluctuates considerably, and there are to be found advocates for the use of the rod or lash for every offence, from the disobedience of a school girl to robbery with violence. The Recorder of Dublin recently testified to the deterrent effect of the "cat" for the class of crimes regarded as specially cowardly and brutal. And a grand jury in the city of Dublin have just expressed their opinion that in cases of that description, "the judicious use of the lash is very necessary."

The Albany Times says: "The monstrous doctrine of cumulative sentences held by Judge Noah Davis in the Tweed case has been reduced to an absurdity in the Vermont case reported in our telegraphic despatches yesterday from Rutland, where a poor woman, charged with selling liquor without license, has been convicted on several hundred complaints, and by accumulating the terms of imprisonment under each complaint, has been sentenced by the police court, to the house of correction, for fifty years! If the Appellate Court of Vermont ever has this case brought before it, we can not doubt that it will decide as did our Court of Appeals. Such cumulative sentences are shocking to justice, and repugnant to common sense."

A CONSTITUTIONAL QUESTION.—Judgment was yesterday given by the Queen's Bench Division on the constitutional question raised last Michaelmas term as to the validity of the Local Courts Act, R.S.O., cap. 42, which was passed by the Local Legislature to group certain counties together for judicial purposes. Under sections 16 and 17 of that Act, the County Judge of Lambton held sessions of the Division Court in the county of Middlesex, which he was clearly entitled to do under that Act, but it was contended that the sections named were *ultra vires* because in effect they allowed one county judge to act in a county outside of his powers under his commission from the Dominion Government. Chief Justice Hagarty and Mr. Justice Cameron held that as the whole constitution of the Division Courts is within the power of the Local Legislature, and as no provision for the appointment of Division Court judges is anywhere to be found, the Act is not *ultra vires*. Mr. Justice Armour dissented from this view, and held that the sections were *ultra vires*, as in effect they appointed the County Judge of Lambton the County Judge of Middlesex, and delegated to county judges the power of appointing a county judge. The case in which the point was raised was one of *re Wilson & Maguire*.—*Mail*, Feb. 6.

Respecting private inquiries under the Crimes Act, a correspondent writes: "For a month or two past a private inquiry has daily taken place at Dublin Castle, and prisoners and witnesses have there been subjected to severe and close examination, but the outcome does not appear to have been of material assistance to the authorities. The mode in which the investigation is conducted is certainly of an extraordinary character. A police magistrate specially selected presides, and the Court sits with closed doors. A prisoner is brought in, placed on oath, and then examined, touching the guilt of himself and others. Any question which the judge thinks fit may be put. The man is compelled to answer, but whether his replies denote innocence or guilt he is detained a prisoner during the pleasure of this inquisitorial secret tribunal. Should it appear that he answers the interrogatories falsely, he is then indicted and tried for perjury. All he says is carefully noted down by the officers of the Court, and these sworn statements are made the basis for further enquiries and subsequent accusations of other persons. No counsel or solicitor is allowed to appear on behalf of the prisoner-witness. On several occasions the Lord-Lieutenant himself has been present at the investigations, and the prisoners under examination have, in some instances, been questioned by His Excellency personally."

"It is the part of a good judge to extend his jurisdiction." The history of the Court of Chancery shows that this ancient maxim, notwithstanding the criticisms of Lord Mansfield and Sir R. Atkyns, was in practice thoroughly received in that Court; and a decision of the Court of Appeal, (*Vidler v. Colliger*, 47 L. T. Rep. N. S. 283) shows that the changes made in our legal system have not at all impaired the vigor with which the Courts exercise and gradually amplify their jurisdiction. This was the case of an infant who was made a ward of the Court merely for the purpose of invoking its jurisdiction. His father was emigrating to Manitoba, and desired to take his son with him. The son, a lad between seventeen and eighteen years of age, desired to accompany him. Others of the relations, however, thought that the boy's prospects in England were far better than any his father could offer, as he was apprenticed and in the engineering department in the Admiralty, and an uncle offered to maintain him while in the Government employ, until he was able to provide for himself. It is very probable that the Court was perfectly right in supposing that the boy would be more likely to be successful in England than in Manitoba; but we nevertheless think that it is a strong instance of the increase of State jurisdiction, and decline of domestic authority, when we find the Court preventing a father taking his son abroad when the son wishes to accompany him, and is of sufficient age to give an unbiased opinion. We should add that no misconduct on the part of the father had been shown; but he was an undischarged bankrupt. He had entered into a bond on the apprenticeship, and proposed to apply to the Admiralty for a cancellation of the bond. Vice-Chancellor Bacon forbade the father proceeding with any such application, and his decision was upheld, though not without a little doubt, by the Court of Appeal.—*London Law Times*.

The Legal News.

VOL. VI. FEBRUARY 24, 1883. No. 8.

CIRCUMSTANTIAL EVIDENCE.

A peculiar case of judicial error recently came to light in Austria. A strolling beggar, named Knapp, was tried and convicted of a double murder, accompanied by robbery. The charge was supported only by circumstantial evidence. Knapp had been seen near the scene of the murder on the day the crime was committed. The *alibi* which he attempted to establish was shown to be unfounded. He also gave an incredible explanation with respect to the money found on his person. The case seemed clear to the jury, and Knapp was condemned to death. Finding that there was no hope left, he made a revelation which wholly changed the aspect of the case. He confessed that it was he who had committed a burglary which had occurred on the day of the murder at a distant place, and the details which he gave respecting the affair were corroborated in various ways and proved to be correct. The money found on his person was thus accounted for, his previous false story having been concocted to avert suspicion as to the crime of which he was really guilty. But as the burglary took place at the same hour as the murder, and the distance was so great that it was impossible that the same person could have participated in both affairs, the authorities were forced to come to the conclusion that Knapp was innocent of the crime for which he was under sentence of death. The judgment was therefore annulled. A new trial took place, at which he was convicted of the burglary, and sentenced to nine years' imprisonment.

BREAD STAMP.

The bakers of Toronto have raised a constitutional question. Wm. Nasmyth, a baker of that city, in a case before the Queen's Bench Division, questioned the validity of sub-section 2 of clause 1 of by-law 1,128 of the city, which provides that on every loaf of bread sold or offered for sale in the city of Toronto there shall be stamped the weight of such loaf. A motion to quash was made on four grounds: (1) the by-law was *ultra vires*; (2) it was in

restraint of trade; (3) it was unjust; (4) it was impracticable. The Queen's Bench Division gave judgment (Feb. 13) disposing chiefly of the question of practicability, on which the argument turned, and holding that the stamping is practicable, and that the motion must fail and the by-law be upheld.

DECISIONS IN APPEAL, 1882.

The following is a statement of the business disposed of by the Court of Queen's Bench sitting in appeal during the year 1882. [For similar statements for 1880 and 1881 see 4 Legal News, pp. 41, 66, and vol. 5, p. 49.]

The total number of judgments rendered at Montreal in civil cases in 1882 was 144, against 116 in 1880 and 131 in 1881. It appears, therefore, that the increase in the number of judges and terms has been attended by a corresponding increase in the number of decisions, the increase of 25 per cent. in the number of terms, and of 20 per cent. in the number of judges having produced an increase of about 20 per cent. in the number of judgments.

Of the 144 decisions in civil cases, 107 were confirmations and 37 were reversals. The proportion continues about the same as in 1880 and 1881, the chances of obtaining a reversal being only about one to three. It must be observed, however, that under the head of confirmations are included all cases in which the appeal has been discontinued, or dismissed for failure to proceed. So that the proportion of confirmations to reversals of cases actually argued would probably be not much greater than two to one.

We have arranged the names of the cases alphabetically, as follows:

CONFIRMED.

Arochambault & Cie. Typographique, Cantons de l'Est, S. C., St. Francis.
 Arnould & Refuge Ste. Brigitte, S. C. M.
 Baby & Laviolette, S. C. M.
 Bain & City of Montreal, S. C. M.
 Baker & O'Halloran, S. C., Bedford.
 Barnes & Barbeau, S. C., St. Hyacinthe.
 Beausoleil & Normand, S. C. M.
 Beemer & Devlin, S. C. M.
 Bickerdike & Murray, S. C. M.
 Blouin & Brunelle, C. C., St. Francis.
 Bourbonnais & Bourbonnais, S. C. M.
 Bowen & Gordon, S. C., St. Francis.
 Brady & Church, S. C., Ottawa.
 Brankin & La Banque du Peuple, S. C. M.
 Brien & Charron, S. C. M.

Brunet & La Société de Construction, S. C. M.
 Charbonneau & Lozeau, S. C. M.
 Chretien & Crowley, S. C. M.
 Christin & Caty, S. C. M.
 Christin & La Cie. de Navigation Union, S. C. M.
 City of Montreal & Dugas, S. C. M.
 Consolidated Bank & Merchants' Bank, S. C. M.
 Corbell & St. Aubin, S. C. M.
 Corporation Clifton & Hebert, S. C., Bedford.
 Corporation of Roxton & E. T. Bank, S. C., Bedford.
 Coté & Coté, S. C., St. Hyacinthe.
 Coutu & Coutu, S. C., Richelieu.
 Couture & Foster, S. C., St. Francis.
 Cox & Heard, C. C., St. Francis.
 Dubois & Cassidy, S. C. M.
 Edey & Merrifield, S. C., Ottawa.
 Exchange Bank of Canada & Euard, S. C. M.
 Felton & Belanger, C. C., St. Francis.
 Fletcher & Fuller, S. C., St. Francis.
 Gagnon & Loranger, S. C. M.
 Gariépy & Lauson, S. C. M.
 Gault & Archambault, S. C. M.
 Gauthier & Prevost, S. C. M.
 Goldring & La Banque d'Hochelega, S. C. M.
 Harrington & Corse, S. C. M.
 Hart & Pinsonnault, S. C. M.
 Head & Murray, S. C. M.
 Hogan & Dorion, S. C. M.
 Hood & McCall, S. C. M.
 James & Campbell, S. C. M.
 Johnston & Scott, S. C. M.
 Langlois & Brosseau, S. C. M.
 Lapierre & Laviolette, C. C., Richelieu.
 Lapointe & Bondy, S. C. M.
 Larose & Paquet, S. C. M.
 Lavigne & Charron, S. C. M.
 Leclaire & Pharaud, S. C. M.
 Lemieux & Cossitt, S. C. M.
 Leroux & Merchants' Marine Ins. Co., S. C. M.
 Letourneux & Delisle, S. C. M.
 Limoges & Trudel, S. C., Richelieu.
 Lionais & La Banque Molson, S. C. M.
 Mackenzie & Mongeon, S. C. M.
 Mackinnon & Thompson, S. C. M.
 McDonnell & Ross, S. C. M.
 McGillivray & Cullen, S. C., Ottawa.
 McLaughlin & Bank of Montreal, S. C. M.
 Marsolais & Gareau, S. C., Joliette.
 Menard & Hughes, S. C. M.
 Mondelet & Roy, S. C., St. Hyacinthe.
 Mondou & Quintal, S. C. M.
 Morgan & Lord, S. C. M.
 Mulhall & St. Ann's Mutual Building Society, S. C. M.
 National Insurance Co. & Trudel, S. C., Ottawa.
 N. Y. Central Car Co. & Donovan, S. C. M.
 O'Neill & Morrice, S. C. M.
 Osborne & Paquette, S. C. M.
 Perrault & Charbonneau & Marcotte, S. C. M.
 Pickford & Hamilton, S. C. M.
 Poirier & Larose, S. C. M.
 Pudney & Chartrand, S. C. M.
 Ramsay & Almour, S. C. M.
 Reford & Les Ecclesiastiques, S. C. M.
 Rhéaume & Massie, S. C. M.
 Richelieu & Ontario Navigation Co. & Durnford,
 S. C. M.

Richelieu & Ontario Navigation Co. & Levesque
 S. C. M.
 Robert Namur & Trust & Loan Co., S. C. M.
 Robillard & Dumesnil, S. C. M.
 Ste. Marie & Stone, S. C. M.
 Sarrasin & Cameron, C. C., St. Hyacinthe.
 Senecal & Laurin, S. C. M.
 Seybold & Evans, S. C. M.
 Shaw & St Louis, S. C. M.
 Short & Long, S. C., St. Francis.
 Soeurs de la Congregation & Ste. Cunegonde, S. C. M.
 Sovereign Ins. Co. & Picken, S. C. M.
 Stadacona & Cabana, S. C., St. Francis.
 Stevens & Hart, S. C., Bedford.
 Stevenson & Henshaw, S. C. M.
 Synod of Montreal & Trust & Loan Co., S. C. M.
 Taylor & McLean, C. C., Ottawa.
 Tempest & Baby, S. C. M.
 Tempest & Baby, S. C. M.
 Tempest & Toussignant, S. C. M.
 Tempest & Toussignant, S. C. M.
 Thibodeau & Vallée, S. C. M.
 Trust & Loan Co. & Hutton, S. C. M.
 Trust & Loan Co. & Synod of Montreal, S. C. M.
 Waddell & Court, S. C. M.
 Wilkes & Skinner, S. C., St. Francis.
 Wood & St. Germain, S. C. M.
 Workman & Fair, S. C. M.

REVERSED.

Aetna Life Insurance Co. & Larose, S. C. M.
 Allott & Eastern Townships' Bank, S. C., St. Francis.
 Archambault & Lamère, S. C. M.
 Banque d'Hochelega & Dionne, S. C. M.
 Banque d'Hochelega & Prevost, S. C. M.
 Banque Jacques-Cartier & Giraldi, S. C. M.
 Baylis & Stanton, S. C. M.
 Betournay & Moquin, S. C. M.
 Canada Paper Co. & British Land Co., S. C., St.
 Francis.
 Canada Shipping Co. & Hudson Cotton Co., S. C. M.
 Chalut & Banque Jacques-Cartier, S. C. M.
 Charlebois et vir & Charlebois et al, S. C. M.
 Charlebois & Charlebois, S. C. M.
 Desroches & Gauthier, S. C. M.
 Dominion Land Co. & Hall, S. C., St. Francis.
 Equitable Ass. Co. & Perrault, S. C. M.
 Gilman & Court, S. C. M.
 Hale & McLennan, S. C., St. Francis.
 Hotte & Champagne, S. C. M.
 Kennedy & Collinson, S. C. M.
 Kneen & Boon, S. C. M.
 Loranger & Colonial Investment Co., S. C. M.
 Loranger & Reed, S. C. M.
 Lord & Elliott, S. C. M.
 Molson & Carter, S. C. M.
 Nightingale & Société de Construction St. Jacques,
 S. C. M.
 Normand & Beausoleil, S. C. M.
 Quinn & Leduc, S. C. M.
 Racine & Kane, S. C. M.
 Rawley & Quintal, S. C. M.
 Robert & Beard, S. C. M.
 St. Ann's Mutual Building Society & Watson, S. C. M.
 St. Lawrence Navigation Co. & McNamee, S. C. M.
 Sauré & Boileau, S. C., Terrebonne.

Tremblay & Turgeon, S.C.M.
Trust & Loan Co. & Quintal, S.C.M.
Trust & Loan Co. & Quintal, S.C.M.

The judgments at Montreal on appeals from the respective districts, in the year 1882, were as follows :

	C.	R.	Total.
Montreal	80	32	112
Ottawa	5	0	5
Terrebonne	0	1	1
Joliette	1	0	1
Richelieu	3	0	3
St. Francis	10	4	14
Bedford	4	0	4
St. Hyacinthe	4	0	4
Iberville	0	0	0
Beauharnois	0	0	0
	107	37	144

The fact that in 32 appeals from the country districts, the judgment was affirmed in all but five cases, is highly creditable to the administration of justice in those districts.

There were also three criminal cases decided at Montreal. On two writs of error, the judgment was affirmed in one case (*Thayer v. Reg.*), and conviction quashed in the other (*Kelly v. Reg.*) In the third case (*Reg. v. Suprani*), a reserved case, the conviction was maintained.

In the Quebec Division there were 59 judgments in civil cases. In 30 cases the judgment was confirmed, and in 29 cases the judgment was reversed.

There were also 4 judgments at Quebec on reserved cases. In 3 cases the conviction was affirmed, and in 1 case the verdict was set aside.

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, JANUARY 31, 1882.

SICOTTE, TORRANCE, RAINVILLE, JJ.

DEVLIN v. WILSON.

Action for commission.

The judgment inscribed in Review was rendered by Mr. Justice Doherty in the Superior Court, Montreal, Dec. 11, 1882, dismissing the plaintiff's action. His Honor made the following observations in rendering judgment :—

This is an action for a commission. In the year 1877 a man named O'Brien and another had a claim against the Government, and O'Brien transferred this claim to Wilson, his private creditor. The matter remained unsettled for two

or three years, when the plaintiff and defendant met, and the plaintiff, who was a notary represented to the defendant, that he could go to Ottawa about the matter, and he offered to negotiate a settlement for a commission of \$200. A writing was made to that effect, stipulating that if the plaintiff succeeded in effecting a transmission of the money from the Government he was to get the \$200. The plaintiff now sues for the commission, but the defendant denies that he ever succeeded in getting the money for him. There appears to be no evidence in the record to show that plaintiff has rendered any services in the matter. Except what is admitted by the defendant himself, there is nothing to show that the plaintiff ever was at Ottawa in connection with the business. Two lawyers were brought up to say that it is worth \$200 for a professional man to go to Ottawa to attend to any business; but they do not say that the plaintiff ever went to Ottawa. There is no evidence that the plaintiff ever negotiated with the Government, or that he ever put his foot inside of a public office in connection with the business. The action is brought for commission under a contract; no commission was earned, and the action must be dismissed.

The above judgment was unanimously confirmed by the Court of Review.

Bras & Branchaud for the plaintiff.

Bras & Co. for the defendant.

SUPERIOR COURT.

MONTREAL, Dec. 11, 1882.

Before DOHERTY, J.

HATU v. BRODEUR.

Commission for procuring Loan—Action for commission where loan was not effected.

PER CURIAM. This is an action by the plaintiff to recover the sum of \$130, alleged to be due by the defendant as commission for procuring for him a loan of \$13,000. The defendant was indebted to the Credit Foncier Company, and was desirous of paying off their claim on the 1st of June, when the annual day of payment came round. But in order to pay off the Credit Foncier, he required a loan of \$13,000. He accordingly entered into a written agreement with the plaintiff, in which the conditions were specially set forth, and the earning of a commission of one per cent. was made dependent on

the loan being obtained by the plaintiff. The plaintiff, it appears, spoke to two notaries about the matter, without the negotiation resulting in anything; and finally, when it was probably too late for the purposes of the defendant, he spoke to Mr. Warner, and Mr. Warner agreed to furnish the money on getting \$40 commission. The cheque for the \$40 has never been presented, and it was payable at the plaintiff's office. In the meantime, however, the defendant got the money in another quarter, and he did not take the loan from Mr. Warner. Now the plaintiff's action is for a commission for procuring a loan. If the defendant had interfered with him in getting the loan, as he pretends, he might have brought an action of damages. Instead of that, he sues on a contract for a commission. He has earned no commission in the proper sense; and the action must, therefore, be dismissed.

Longpré & Cie. for plaintiff.

T. & C. C. de Lorimier for defendant.

SUPERIOR COURT.

MONTREAL, Dec. 30, 1882.

Before DOHERTY, J.

LABRANCHE V. LABRANCHE et al.

Alimentary allowance—Offer of children to board parent.

PER CURIAM. This is an action by a father against two of his children for an alimentary allowance. The father sues *in forma pauperis*, and the children plead *in forma pauperis*, and sever in their defence. The plaintiff has established a right of action, but the difficulty is the extreme poverty of the defendants. The children offer to board the father at their own table; but the case is complicated by the fact that the father now has his third wife, and what is to be done with the stepmother or second stepmother? The case is somewhat of a puzzle. I doubt whether the Court has power to order the father to go and live with the children, but even if the Court does possess this power, I am not disposed to think it should be exercised under the circumstances of this case. The plaintiff's demand is moderate, being only for six dollars per month. The Court will order one of the children to pay 75 cents per week, and the other 50 cents per week.

Desjardins & Cie., for plaintiff.

J. C. Lacoste, for defendants.

SUPERIOR COURT.

MONTREAL, Dec. 30, 1882.

Before DOHERTY, J.

CHAMPEAU V. MOQUIN et al.

Liability of heirs for notarial charges on settlement of succession—Interruption of prescription—Admission of co-debtor.

PER CURIAM. This is an action by a notary for professional services. It is brought against Adeline Moquin and her husband for services in settling the succession of Joseph Moquin. There were three heirs of this estate, and they wanted the succession arranged. An action is now brought by the notary whom they employed for that purpose. Part of the services is prescribed, but the plaintiff alleges interruption of prescription, and it is also alleged that the heirs are jointly and severally liable. The defendant denies that there has been interruption of prescription, and it is further alleged that there is no solidarity between the heirs, and that Adeline Moquin is only liable for one-third. This third (of the part not prescribed) is tendered with the plea. The plaintiff, by his answer to the plea, abandons the idea of solidarity, so that two-thirds of the claim must be struck off; but he insists that the co-debtor made a note which had the effect of interrupting prescription. But the plaintiff having abandoned the pretension that there is solidarity, the admission of the co-debtor could not interrupt prescription as to the defendant. The tender of the defendant for \$28.92 must, therefore, be maintained, and the costs go against the plaintiff.

Geoffrion & Cie. for plaintiff.

Doutre & Joseph for defendant.

SUPERIOR COURT.

MONTREAL, Dec. 30, 1882.

Before DOHERTY, J.

BRUCHESI V. THE CORPORATION OF THE VILLAGE OF ST. GABRIEL.

Corporation—Liability of Municipal Corporation for acts of its officers in making illegal arrests.

PER CURIAM. The plaintiff in this case, who is a grocer, sent out two men to deliver goods in the village of St. Gabriel. A constable in the village thought these men were intruders, doing business without a license. He accordingly arrested them, and they were taken away and detained for some time. Finally they were re-

leased, and the present action is brought against the Corporation, based upon the unjustifiable arrest. The case is similar to that of *Doolan v. Corporation of Montreal*, (18 L.C.J. 124) in which I was counsel. The question in the case of *Doolan* was whether a municipal corporation is responsible for the acts of its officers in making illegal arrests. In the Superior Court Judge Mondelet dismissed the action. Then, in Review, that judgment was unanimously reversed, Judge Mondelet concurring in the reversal of his own judgment. In appeal the judgment of the Court of Review was confirmed by three Judges, Judges Duval and Badgley dissenting. So that there were six Judges for maintaining the action, and two against. The Court, in the present case, taking into consideration that decision and other authorities on the question, is disposed to maintain the action. Fortunately the damages are small: the Court has come to the conclusion to give \$50, with costs of the lowest class, Superior Court.

Trudel & Co., for plaintiff.

Geoffrion & Co., for defendant.

SUPERIOR COURT.

MONTREAL, April 29, 1882.

Before JOHNSON, J.

THE COLLEGE OF PHYSICIANS AND SURGEONS OF
THE PROVINCE OF QUEBEC *v.* GARON.

Unlawful practice of Medicine—42-43 V. c. 37,
s. 28—*One penalty sued for where several
offences are alleged.*

PER CURIAM. This is an action under the Statute of the Province, 42 & 43 Vict., C. 37, Sec. 28, imposing a penalty of not less than \$25, nor more than \$100 upon any person who without being entitled to registration under the provisions of the act shall be convicted of having practised medicine, surgery, or midwifery in the Province of Quebec for hire, gain, or hope of reward, and the particular facts alleged against the defendant are that he attended three persons who are named, one of them at St. Constant, and the two others at Laprairie, and received, by way of fee, \$2 in each of two of the cases, and \$1.25 in the other. The conclusion is for one penalty only.

The defendant pleaded a *défense en droit*; a general plea, and a special one alleging that he is an old man over seventy, and received the money as travelling expenses, which would not subject him to the penalty of the Statute.

The brother of one of the patients proves that his sister who died of consumption in July 1881, was attended, in June, by the defendant who administered certain remedies to her, and got paid \$1.25, asking, however, for \$3.

The husband of another patient who had a cancer, but who seems to have survived the treatment, proves that the defendant prescribed for his wife, and gave her a bottle of something to be taken internally, and also an external application. In this instance the defendant bargained for, and got \$2, besides his board and lodging for two days. I must give the penalty asked. There is no objection made on the score of two offences being alleged: and it cannot be said that no penalty is due, merely because two have been incurred. The defendant is very old and very poor, and appears to be what is now known as a "crank." The judgment is for \$25 for the first case proved, viz., that of Madlle. Gervais; the court reserving to pronounce as to imprisonment if it should be asked.

Mercier & Co., for the plaintiff.

O. Augé, for the defendant.

CIRCUIT COURT.

MONTREAL, January 23, 1882.

Before JETTE, J.

MICHAELS *v.* PLIMSOLL.

Lawyer's Letter—*Exigibility of fee.*

Held, that where a letter has been written by a lawyer, in pursuance of instructions from a client, to a debtor of the latter, requesting payment of a debt, and the debtor settles the claim, the sum of \$1.50 may be claimed by the lawyer from the debtor, as the fee for such letter, and he may sue therefor in the name of his client.

The plaintiff sued for \$1.50, fee for a lawyer's letter which had been sent to the defendant.

The defence was that the tariff does not contain any mention of such fee, and it was not taxable.

PER CURIAM. The defendant after having received a "lawyer's letter," paid the amount of the account to the plaintiff, but refused to pay anything for the letter. The advocate has sued in his client's name for \$1.50, fee on the letter. I think the action should be sustained. The

letter was written in the interest of the defendant, and to save him the costs of a suit, and the creditor has a right to recover the amount, inasmuch as he is creditor for the costs until distraction has been obtained.

Judgment for plaintiff.

Quinn & Weir, for plaintiff.

Lane, for defendant.

ACCEPTANCE OF BILL CONTAINING UN-FILLED BLANKS.

ENGLISH HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION, NOV. 2, 1882.

GARRARD v. LEWIS.

A bill of exchange which contained the sum of 14l. in figures in the margin, but no words in the body to denote the amount, was accepted by the defendant and returned to the drawer to be filled in. The drawer fraudulently inserted the words "One hundred and sixty-four" in the body, and altered the marginal figures to that amount and issued the bill. *Held*, that the defendant was liable on the bill to the plaintiff, an innocent holder for value. The figures in the margin of a bill are merely an index or summary of the contents of the bill.

Action by the indorsee of a bill of exchange against the acceptor. The bill read as follows when presented for payment:

"£ 164 Os. 6d,

BRISTOL, Feb. 22, 1882.

Four months after date pay to my order the sum of one hundred and sixty-four pounds and sixpence, value received.

SYDNEY F. BEES.

To Mr. John Lewis, Salisbury."

Defendant's acceptance appeared upon the bill, as also the indorsement of the drawer. The defence was forgery and material alteration. The opinion states the material facts.

BOWEN, L. J. This was an action by the indorsee of a bill of exchange against the acceptor, tried by consent before myself without a jury. The first ground of defence, that the acceptor's signature was itself a forgery, was abandoned at the trial. It remains for me to consider the second defence put forward, viz., that the bill after issue was altered in a material part. The bill of exchange in question had been drawn by one Sidney Bees, four months after date, on the defendant. At the time when the defendant appended his signature to the document, the sum to be mentioned in the body of the bill was left in blank, but in the margin of the bill were the figures 14l. Os. 6d., which

was the sum for which the defendant desired to accept. Bees subsequently filled in the blank in the body of the bill for 164l. Os. 6d., and fraudulently altered the figures in the margin to that sum. Having done so he indorsed the bill to the plaintiff, who took it as a *bona fide* holder for value for the larger amount. It was contended before me on the part of the plaintiff that the document at the time it was handed to Bees was, in spite of the marginal figures, an acceptance in blank which did not issue as a bill till after the body of the bill had been filled in, and that the alteration of the marginal figures was not an alteration after, but before or at the time of issue. Secondly, the plaintiff's counsel maintained that the defendant on account of his negligence was precluded, as against a *bona fide* holder for value, from disputing what Bees had done. From the view I take of this case it is unnecessary for me to examine or refer to the series of cases cited before me, beginning with *Young v. Grote*, 4 Bing. 253; which deal with the question of negligence as applied to negotiable instruments. It is however necessary that I should state what in my view was the character of the document when handed by the defendant to Bees, and for this purpose to consider what is the exact import and effect of marginal figures at the head of a bill of exchange. They do not seem in general to have been considered among merchants as of the same effect and value as the mention of the sum contained in the body of the bill. The history of these marginal figures may perhaps be shortly summarized as follows: The first model of a bill of exchange preserved to us, and which dates from 1381, does not I believe possess them, though it does possess the votum or invocation with which merchants' bills used generally to commence, and which usually preceded the figures. The marginal figures at the head of a bill, which have since become a matter of common usage, were probably added at a very early date, in order that the amount of the bill might strike the eye immediately, and were in fact a note, index, or summary of the contents of the bill which followed: (see Nougulier, *Lettres de Change*, edit. 1875, p. 127, "Les chiffres ne sont que pour simple note.") Heineccius, who treats such marginal figures as part of the lemma or heading, does not speak of them as

an essential part of the bill, and the fact that by the law of some countries the amount of the bill was necessarily repeated, both in figures and in words, is adduced by him as a reason for this view (edit. A. D. 1769, cap. iv. s. 5; see also cap. iv. s. 12); "Denique sollemne etiam est campeoribus, sub finem lemmatis cifris exprimere summam soluendam, addito monetæ genere, quo exactori sit satisfaciendum; quamvis hoc requisitum vel ideo, essentiale dici nequeat, quod summa in ipsis litteris cambialibus his exprimi solet." "Hoc requisitum non esse essentiale vel inde patet, quum tamen debitor sine falsi crimine in ipsa obligatione nihil mutare possit. *Aducitur ergo summa magis notitia, quam necessitatis causa.*" Marius, the first English writer on the subject (2nd edit. A. D. 1655, p. 34) in explaining that the words in the body are in case of difference to govern, adds: "The figures at the top of the bill do only, as it were, serve as the contents of the bill and a *breuiat* thereof, but the words at length are in the body of the bill of exchange, and are the chief and principal substance thereof, whereto special regard ought to be had." The substance of this passage is reproduced by Beames, § 193. Story (Bills of Exchange, § 42) deals with the matter as follows: "The sum is sometimes also expressed in figures in the superscription as well as in the body of the instrument in letters, for greater caution. But if any of the figures on the superscription differ from the sum in words in the body of the instrument, the letters will be deemed to be the sum." This view has received judicial sanction in the case of *Sanderson v. Piper*, 5 Bing. N. C. 431, where a bill containing £245 as a marginal figure, but two hundred pounds in the body of the bill in words was held to be a bill for the latter sum. The case of *Rex v. Elliott*, 1 Leach, C. C. 175, is distinguished by and explained by Tindal, C. J. in *Sanderson v. Piper*. Let us now apply the above proposition to the case of a document like the present, signed originally in blank with a marginal figure or index, which has since been improperly altered. A document which contains such a marginal index, but in which a blank is left by the acceptor to be filled in with the dominant and all important statement in the body of the bill defining the amount for which it is accepted, is not a perfect bill till this

dominant portion of the bill has been filled in. The document is not invalid simply because it is incomplete. It creates certain rights and obligations just as a blank acceptance does. But as the blank is presumably intended to be filled with something, the document till this "something" has been added is not complete. Nor is the question merely what is the actual limit of authority conferred by the acceptance in blank of such a document on the person to whom the acceptor hands it, but rather, what authority the acceptor by his conduct holds out that person as possessing when the bill has reached the hands of innocent holders who do not know that the actual authority conferred is a limited one only. Let me assume first a case in which no marginal figure exists at all, but in which a blank acceptance is left to be filled in, but which is subsequently filled in with a sum in the body of the bill larger than that which the acceptor has actually directed. It is plain, I think, that in the hands of a *bona fide* holder for value without notice, a bill so filled in binds the acceptor to the full amount. Next, let me assume a case of a similar excess of authority, where however a marginal index exists on the bill for a smaller sum than that which has subsequently been placed in the body of the bill. Is the apparent and ostensible authority of the drawer to whom the acceptance was intrusted in blank necessarily limited by the figure in the margin, when the holder of the bill is acting innocently and in good faith? I think not. For it is conceivable that after the bill was signed in its original form the acceptor may have changed his mind and authorized the drawer to disregard the index and to fill in the body of the bill with larger amount. If the acceptor had in fact authorized this to be done, surely he could not as against a subsequent holder deny that the bill for the larger amount so inserted by his express direction was his bill simply because the marginal figures have been left unchanged. *Sanderson v. Piper* seems to show this much at all events. Yet if the holder in the absence of notice would have a right to neglect the marginal figure if it remained unaltered, and to look only to the body of the bill, it would seem next to follow that even if the marginal figure was altered, the holder would have a right in the absence of notice to assume that it was altered properly. The holder's right

to look to the body of the bill would not be affected by such alteration, if he did not know the alteration was improper. *A fortiori*, his right to look to the body of the bill would remain the same when he did not know the marginal figure had undergone any alteration at all. Thus I arrive at the conclusion that a man who gives his acceptance in blank holds out the person to whom it is intrusted as clothed with ostensible authority to fill in the bill as he pleases within the limits of the stamp, and that no alteration (even if it be fraudulent and unauthorized) of the marginal figure vitiates the bill as a bill for the full amount inserted in the body, when the bill reaches the hands of a holder who is unaware that the marginal index has been improperly altered. For these reasons the plaintiff in this case would seem to be entitled to succeed, and judgment must be entered for him with costs.

Judgment for the plaintiff.

RECENT SUPREME COURT DECISIONS.

Will—Insanity—Error.—This was an appeal from the Court of Queen's Bench, P.Q. The action was originally brought in the Superior Court by Pierre Lefrançois' executor under the will of the late Wm. Russell, of Quebec, against Austin, curator to the estate of Russell during the lunacy of the latter, to compel Austin to hand over the estate to the executor. After preliminary proceedings had been taken, Elizabeth Russell, the appellant, moved to intervene and have Russell's last will set aside, on the ground that it had been executed under pressure by Dame Julie Morin, Russell's wife, in whose favor the will was made, while the testator was of unsound mind. The intervening party claimed and proved that Morin was not the lawful wife of Russell, having another husband living at the time the second marriage was contracted. Russell, who was a master pilot, died in 1881, having made a will two years previously. His estate was valued at about \$18,000. The evidence in the case was voluminous and contradictory. On the 4th October, 1878, Russell made a will by which he bequeathed \$4,000 and all his household furniture and effects to his wife Julie Morin; \$2,000 to his niece, Ellen Russell; \$1,000 to the Rev. Father Sexton, for charitable purposes, and the remainder of his estate to his

brothers, nephews and nieces in equal shares. On the 8th of the same month he made another will before the same notary, leaving \$800 to his wife Julie Morin, \$400 to each of his nieces, Mary and Elizabeth Russell, and \$400 to his brother Patrick, with reversion to the nieces if not claimed within a year, and the remainder to Ellen Russell. On the 27th November, 1878, Russell made a will, which is the subject of the present litigation, by which he revoked his former wills, and gave \$2,000 to Father Sexton, for the poor of St. Rochs, and the remainder of his property to his wife Julie Morin. On the 10th January following, Russell was interdicted as a maniac, and a curator appointed to his estate. He remained in an asylum until December, 1879, when he was released and lived until his death with his sister Ellen Russell, sister of the appellant. The Superior Court, (Tessier, J.), held that the will was valid, and this decision was affirmed by the Court of Queen's Bench.

Held, (reversing the judgment of the Q.B., Ritchie, C. J., and Strong, J., dissenting), (1) that the proper inference to be drawn from all the evidence as to the mental capacity of the testator to make the will of the 27th November, was that the testator, at the date of making said will, was of unsound mind. (2) That as it appeared that the only consideration for the testator's liberality to Julie Morin was that he supposed her to be his "beloved wife, Julie Morin," whereas she was at the time the lawful wife of another, the universal bequest to Julie Morin, was void, by reason of error and false cause. (3) That it is the duty of an appellate Court to review the conclusion arrived at by Courts whose judgments are appealed from upon a question of fact, when such judgments do not turn upon the credibility of any of the witnesses, but upon the proper inference to be drawn from all the evidence in the case.—*Russell v. Lefrançois*, Jan. 1883.

GENERAL NOTES.

Bradlaugh, the English agitator, having been expelled from the House of Commons, brought an action for assault against Mr. Erskine, the Serjeant-at-Arms. Mr. Justice Field has dismissed the case, holding that the claim of a member to sit in the House, from which he has been excluded by the House itself, cannot be determined by a court of law, and if the House has power to order his exclusion it must have power to enforce its order. If the Serjeant-at-Arms were not protected by that order in the use of such force as may be necessary to carry it out, the order itself would be a nullity.

The Legal News.

VOL. VI.

MARCH 3, 1883.

No. 9.

PROPOSED CHANGES IN THE CRIMINAL LAW.

We learn from Ottawa that "Mr. McCarthy introduced a bill to amend the Act respecting procedure in criminal cases. He said it provided that persons charged with misdemeanour should be permitted to give evidence on their own behalf. It also provided that when a judge was delayed from attending Court from any cause, the Court might be adjourned from day to day until he could attend. Thirdly, there is a provision for abolishing the right of the Crown to peremptorily challenge jurors."

Two of these three provisions involve alterations in the criminal law, of considerable magnitude; and their suggestion indicates rather the restless love of change, than any very profound conviction of their necessity. The object of testimony is to furnish, as to an alleged fact, evidence on which the Court or jury can safely rely. It is obvious, apart from the lessons of experience, that what people say as to matters in which they are interested is open to suspicion. Practice has shown, as a rule, almost universal, that this suspicion is well founded. Here is what Pothier says on the matter, speaking of the judicial oath administered by the judge for the decision of the suit.

"Je ne conseillerais pas néanmoins aux juges d'user souvent de cette précaution qui ne sert qu'à donner occasion à une infinité de parjures. Quand un homme est honnête homme, il n'a pas besoin d'être retenu par la religion du serment, pour ne pas demander ce qui ne lui est pas due, et pour ne pas disconvenir de ce qu'il doit; et quand il n'est pas honnête homme il n'a aucune crainte de se parjurer. Depuis plus de quarante ans que je fais ma profession, j'ai vu une infinité de fois déférer le serment, et je n'ai pas vu arriver plus de deux fois, qu'une partie ait été retenue par la religion du serment, de persister dans ce qu'elle avait soutenu."

Occasional utterances of the judges in England, under the extended rules of evidence now in force there, seem to recognize that the experience of to-day in England does not differ from that of Pothier in France a hundred years ago.

Under the old usury laws we had examples without end of how little the sanctity of an oath weighed against material interest.

Manifestly the accused who does not intend to plead guilty, will be compelled to offer his testimony, or he is sure to be found guilty, if there is any evidence at all against him. If guilty he will perjure himself in self-defence, and he may do this successfully, if he be clever and self-possessed; and thus one crime will be committed to cover another. If he be innocent, naturally he will speak to avoid the damaging presumption of guilt arising from a voluntary silence. Speaking, if he be stupid and timid, his embarrassment and confusion will be apt to create perfectly legitimate presumptions of guilt, and he may be condemned because he has not skill to avail himself of a pretended privilege.

It is unnecessary to enlarge on the general objections to such a measure, for the reasons against it are well-known.

Mr. McCarthy has not the demerit of inventing this crudity. But the form in which it is presented requires some explanation. Why is a man accused of a misdemeanour to be allowed to tell his own story under oath, and a man accused of a felony to have his mouth closed? Mr. McCarthy will, perhaps, let us know the principle on which he bases this distinction, which at first sight appears to be arbitrary and unreasonable.

A judge being delayed for a whole day going to hold a criminal court, seems to be a very improbable contingency, and if it did happen one would suppose that the common law would supply the remedy common-sense suggests. But if there be laggards, who are also sticklers, by all means let a statute lay down the rule, and, if possible, let it be laid down in comprehensible terms.

The third of the proposed changes attributed to Mr. McCarthy is evidently a reporter's mistake. Mr. McCarthy cannot fail to know that the Crown cannot challenge jurors save for cause. It is probable that our reformer desires to deprive the Crown of the right to cause a juror to stand aside till the pannel is exhausted. The practical inconveniences of an amendment of this sort are too numerous and minute to be easily explained to those who have not had personal experience of Crown business; but one

thing is clear, that if the Crown is no longer to be allowed to make a juror stand aside, the prosecution should have the same right of peremptory challenge as the defence.

The ambition to improve the laws of one's country is laudable; but the danger of popular bodies being swept away by the superficial appearance of improvement is very great. The proper check is to be found in the control of Government. The initiative of fundamental changes in the administration of justice should be jealously preserved by the Crown.

R.

TITLES.

The *Minerve* has a sensible article directed against the misuse of the titles "Chevalier" and "Commandeur." In addition to its remarks on the bad taste of thrusting titles down one's throat at every word, it should be remembered that it is illegal to use a foreign title, or to wear a foreign decoration, without leave of the Queen. We not only misuse foreign titles, but we both overuse and misuse our own. Newspaper reporters never speak of a Minister without the prefix of "Honourable." A gentleman dies and we have it formally announced that "A. B. Esquire," is no more. This is not done in England. In France, before the revolution, titles of rank were very sparingly used, except by *parvenus*; the second son of the king was called "Monsieur," and his eldest daughter "Madame," just as we use "Sir" in addressing members of the English Royal family in private.

But the more objectionable fault is the illegal assumption of titles not granted by the Queen. This is very common; it is nevertheless a dishonest form of vulgarity. Thus we have Judges, former Senators, bygone local Ministers, Legislative Councillors, and Speakers of Legislative Assemblies, all taking, or given the title of "Honourable," to which they have not a shadow of right.

R.

Mr. M. H. Sanborn, a brother of the late Mr. Justice Sanborn, and for many years Deputy Sheriff of Montreal, died in this city on Sunday, February 25. The *Gazette* says of the deceased: "For twenty-eight years Mr. Sanborn had filled in a manner eminently satisfactory the position of Deputy-Sheriff of Montreal, and his death removes from amongst us a faithful public servant, whose name will ever be mentioned with the respect due to the memory of an honourable, kind-hearted gentleman and an official of the most sterling probity."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, JAN. 25, 1882.

MONK, RAMSAY, TESSIER, CROSS & BAEY, JJ.

REGINA V. JOHN DWYER, *alias* McGUIRE.

Bigamy—Onus probandi.

On a trial for bigamy, the Crown having established the fact of the husband's two marriages it is for the prisoner to show the absence of the first wife during seven years preceding the second marriage; and where such absence is not proved, it is not incumbent on the Crown to establish the prisoner's knowledge that the first wife was living at the time of the second marriage.

RAMSAY, J. This is a reserved case from the district of Aylmer. The prisoner was convicted of bigamy. The two marriages were proved, the first to Mary Brophy at St. Columban, in the district of Terrebonne, in 1855, the second to Marie Fleury at Allumette Island, in the district of Ottawa, in 1878. It was also proved that the first wife was living at the time of the second marriage at St. Columban, where the marriage of 1855 took place.

The Court charged the jury: 1st—"That the marriage was complete by the marriage ceremony, and did not require consummation, and that it was not incumbent on the Crown to prove the presence of the first wife with the prisoner." 2nd—"That the continuous absence of the first wife during seven years immediately preceding the second marriage *not* being proved, it was not incumbent on the Crown to prove the prisoner's knowledge that the first wife was living. The Court also added that under the above circumstances it was incumbent on the prisoner to show that he had made reasonable inquiries."

I take it that the Court in effect held, that the marriage being established, it was for the prisoner to show the *absence* of seven years; that this absence not being proved, there was no question of the prisoner's ignorance. At the argument it was contended that the absence of the prisoner from his wife was the presumption of law, and that the Crown should prove presence. In support of this novel pretension we were referred to the case of *Regina v. Heaton*, (3 F. & F., p. 819), where it was contended that Mr. Justice Wightman had held that the proof of presence was on the Crown, and that this

holding had been maintained by the Court of Crown Cases Reserved in *Reg. v. Curgervan*. (L.R., 1 C.C.R., p. 1.) On reference to the case of *Heaton* it will be seen that Mr. Justice Wightman did not hold that the proof of presence was on the Crown. In that case there was evidence that the husband only stayed with his wife perhaps four years at most. It then became necessary for the Crown to show knowledge on the part of the prisoner, who could not be expected to prove the negative—non-knowledge. It was this decision of Mr. Justice Wightman that was approved of in *R. v. Curgervan*. The case before us differs in this, that Mr. Justice Macdougall returns the fact that absence was not proved. I therefore think the conviction should be maintained.

Conviction maintained.

Fleming, Q.C., for the Crown.

Foran for the prisoner.

COUR DU BANC DE LA REINE.

MONTREAL, 25 janvier 1883.

DORION, J. en C., RAMSAY, J., TESSIER, J., CROSS, J.

ROSS et al., es-qual. v. CONVERSE.

41 Vict., c. 38—Avis.

Jugé : Que les syndics-conjoints de l'Assurance Agricole du Canada ont été dûment nommés en vertu du chapitre 38 de l'Acte 41 Vict. (Can.), et qu'ils sont revêtus de tous les pouvoirs appartenant à des syndics officiels de même que s'ils avaient été nommés en vertu de l'Acte de faillite de 1875 et ses amendements.

Qu'en l'absence de dispositions spéciales, le fait qu'un avis contenant les demandes de versements, a été mis à la poste à l'adresse des actionnaires sera une preuve suffisante de la demande de ces versements.

Il s'agit d'une poursuite intentée par les demandeurs Ross, Fish et Dumesnil, en leur qualité de syndics-conjoints de la Compagnie dite "The Canada Agricultural Insurance Company" contre Jonathan Converse, pour les 4ième et 5ième versements sur cinq parts ou actions dans les fonds de cette Compagnie, faisant une somme de \$100.

Les appelants allèguent qu'ils ont été nommés syndics-conjoints en vertu de l'Acte du Canada 41 Victoria, chap. 38, et que comme tels ils sont en possession des biens de la dite Compagnie afin d'en liquider les affaires.

L'action a été renvoyée par la Cour de Circuit

siégeant à Sherbrooke, le 31 octobre 1881, sur le principe que les demandeurs n'avaient pas qualité suffisante ou *locus standi* pour intenter de semblables poursuites en vertu de l'Acte du Parlement précité.

La Cour d'Appel a infirmé ce jugement et condamné le défendeur Converse à payer la somme demandée.

TESSIER, J. En lisant le préambule du Statut en question et les sections qui suivent, il est facile de conclure que le Parlement a nommé ces syndics officiels conjointement avec les pouvoirs de poursuivre dans l'intérêt des créanciers et de ceux des actionnaires qui ont déjà payé leurs versements pour liquider finalement les affaires de cette Compagnie.

Le préambule dit : " Considérant que les actionnaires ont résolu qu'il est de leur intérêt " que les affaires de la Compagnie soient " liquidées, qu'à cette fin ils ont nommé Philip " S. Ross et W. J. Fish, syndics et liquidateurs, " qu'il serait opportun d'ajouter G. H. Dumesnil aux dits syndics et liquidateurs..... " qu'ils ont fait quelque progrès dans la liquidation de la Compagnie, et qu'une action " immédiate est désirable dans l'intérêt de la " Compagnie et de ses créanciers, il est décrété : " Que les biens et effets de la dite Compagnie " seront, sans qu'il soit fait aucune cession ou " rien autre chose de sa part, confiés aux dits " Ross, Fish et Dumesnil comme co-syndics, et " toutes personnes y intéressées comme actionnaires, créanciers, assurés ou autrement seront " dès lors à toutes fins, dans la même position " que si les dites parties étaient des syndics " officiels."

Il semble que cet acte spécial du Parlement, s'il veut dire quelque chose, constituent les demandeurs comme syndics officiels des actionnaires et des créanciers. Mais s'il y avait doute, cela disparaîtrait par le fait prouvé en cette cause que, depuis la passation de ce Statut, il y a eu une assemblée générale des créanciers, à laquelle il a été nommé des inspecteurs, mais pas d'autres syndics. En vertu de la section 79 de l'Acte de Faillite de 1875, cela les constituerait syndics définitifs.

Il a été fait une autre objection savoir : que les versements n'avaient pas été légalement appelés. Le Statut n'indique pas de mode spécifique; il suffit dans ce cas qu'il y ait une notice raisonnable aux actionnaires. Or il est

en preuve qu'une notice a été adressée par la poste aux actionnaires et au défendeur Converse en particulier, et de plus notice publique dans un journal anglais et dans un journal français un mois d'avance. Ce point a été décidé dans plusieurs causes dans lesquelles cette question avait été spécialement plaidée par exception.

Les appelants ont cité plusieurs précédents entr'autres Fisher's Harrison's Digest, (p. 7160) : "A circular sent to every shareholder in a railway company, informing him that the directors had resolved on making a call, constitutes the call."

Ross v. Franchère, Legal News, Vol. 5, p. 23; *Abbott's Digest*, Vo. Corporations 36 & 37; *Angell & Ames*, on Corporations, p. 517.

Les demandeurs ayant donc prouvé que le défendeur est un des actionnaires, qu'il a payé au présent demandeur, les 2^{ème} et 3^{ème} versements, il est difficile d'en venir à une autre conclusion que celle de condamner le défendeur Converse à payer aux demandeurs ce-qualités la somme demandée.

Jugement infirmé.

Camirand & Hurd, pour l'appellant.

A. W. Atwater, conseil.

G. O. Doak, pour l'intimé.

D. Macmaster, C.R., conseil.

COURT OF REVIEW.

MONTREAL, February 21, 1883.

SIOOTTE, J., TORRANCE, J., MATHIEU, J.

PENNY et al. es qual. v. THE MONTREAL HERALD PRINTING AND PUBLISHING Co. et al.

Procedure — Review — Suit between Lessor and Lessee.

Where there is an inscription in Review of a judgment rendered in a suit between lessor and lessee, the opposite party is entitled, under the C.C.P. 500, to a delay of eight days from date of inscription, before he can be compelled to argue the case.

This was an action against a tenant and a sub-tenant under the law governing procedure between landlord and tenant. The judgment went against the defendants on the 13th February, 1883, and the sub-tenant inscribed in review on the 19th February, 1883.

Branchaud, for plaintiff, applied to have the case heard as a privileged case without delay, citing C.C.P. 894.

Tait, Q.C., for the sub-tenant, *Moses Cochen-thaler*, cited C.C.P. 500 as giving him eight days at least, after the inscription before he could be compelled to argue the case.

After conference among several of the judges at Montreal, the pretension of the defendant, *Cochenthaler*, was sustained, and the Court refused to hear the case within the eight days.

Judah & Branchaud for plaintiffs.

Abbott, Tait & Abbotts for defendants.

COURT OF REVIEW.

MONTREAL, November 30, 1882.

TORRANCE, J., JETTE, J., BUCHANAN, J.

SAUNDERS v. HERSE.

Peremption.

The omission of a letter in the name of plaintiff, in the Prothonotary's certificate of last proceeding, cannot be set up as a bar to peremption where three years have elapsed from last proceeding. The Court may order that the certificate be amended before adjudicating upon the application for peremption.

This was an action taken upon a promissory note, and upon the 17th September, 1879, an entry was made in the *plumitif*: "plaintiff in-scribes at *enquête* the first October next."

On the 3rd October, 1882, the defendant served the plaintiff with notice of application for peremption, and produced in support the prothonotary's certificate of last proceedings, showing that no proceedings had been taken since the plaintiff's inscription of 17th September, 1879.

The plaintiff contested this application on the ground that the certificate of last proceedings was irregular; that the name of the plaintiff, as given in the certificate of the prothonotary, was *Alexander Saunder*, whereas his correct name was *Alexander Saunders*, the final *s* having been omitted in the certificate; that the omission of a letter in the name of plaintiff was a fatal variance. The plaintiff cited the decision of *Torrance, J.*, in the case of *Burland Desbarats Lithographic Co. v. Bemister*, 4 Legal News, p. 101.

Judgment was rendered by *RAINVILLE, J.*, granting the application for peremption, and ordering the prothonotary to amend the name of the plaintiff incorrectly written in the certificate of last proceedings.

The Court of Review unanimously confirmed this judgment.

Dunlop & Lyman for plaintiff.

A. Dalbec for defendant.

CONNECTING CARRIERS AND THEIR LIABILITY.

SUPREME COURT OF THE UNITED STATES,

JANUARY 8, 1883.

MICHIGAN CENTRAL RAILROAD CO. v. MYRICK.

The general doctrine as to transportation by connecting lines of carriers is this: That each carrier confining itself to its common law liability is only bound in the absence of a special contract to safely carry over its own route and safely deliver to the next connecting carrier.

Any carrier may agree that over the whole route its liability shall extend, but in the absence of a special agreement to that effect such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence.

In error to the Circuit Court of the United States for the Northern District of Illinois.

This is an action for breach of two alleged contracts of the Michigan Central Railroad Company with the plaintiff, Paris Myrick, each to carry for him two hundred and two head of cattle from Chicago to Philadelphia, and there to deliver them to his order. It arises out of these facts: Myrick was in 1877 engaged, at Chicago, in the business of buying cattle, sometimes on his own account and sometimes for others, and forwarding them by railway to Philadelphia. The company is a corporation created by the State of Michigan, and its line extends from Chicago to Detroit, where it connects with the Great Western Railroad, which by its connections leads to Philadelphia.

In November, 1877, Myrick purchased two lots of cattle, each consisting of two hundred and two head, and shipped them over the road of the company. One of the purchases and shipments was made on the 7th and the other on the 14th of the month. It will suffice to give the particulars of the first of these transactions, as they were identical in all respects, except in the amount of the draft negotiated and the weight of the cattle.

On the shipment of the cattle Myrick took from the company a receipt, as follows:

"MICHIGAN CENTRAL RAILROAD COMPANY.

"CHICAGO STATION, Nov. 7, 1877.

"Received from Paris Myrick, in apparent

good order, consigned order Paris Myrick (notify J. & W. Blaker, Philadelphia, Pa.):

Articles.	Weight or measure.
Two hundred and two (202) cattle....	240,000
"Advance charges \$12.00. Marked and described as above (contents and value otherwise unknown) for transportation by the Michigan Central Railroad Company, to the Warehouse at	

"WM. GRAGAN, Agent.

On the margin of the receipt was the following:

"This company will not hold itself responsible for the accuracy of these weights, as between buyer and seller, the approximate weight having been ascertained by track-scales, which is sufficiently accurate for freighting purposes, but may not be strictly correct as between buyer and seller. This receipt can be exchanged for a through bill of lading.

"NOTICE.—See rules of transportation on the back hereof. Use separate receipts for each consignment."

On the back of the receipt the rules were printed, one of which, the eleventh, was as follows:

"Goods or property consigned to any place off the company's line of road, or to any point or place beyond the termini, will be sent forward by a carrier or freightman, when there are such, in the usual manner, the company acting, for the purpose of delivery to such carrier, as the agent of the consignor or consignee, and not as carrier. The company will not be liable or responsible for any loss, damage or injury to the property after the same shall have been sent from any warehouse or station of the Company."

On the day this receipt was obtained, Myrick drew and delivered to the Commercial National Bank, at Chicago, a draft, of which the following is a copy:

"\$12,287.57.]

CHICAGO, Nov. 7, 1877.

"Pay to the order of Geo. L. Otis, cashier, \$12,287.57, value received, and charge the same to account of

PARIS MYRICK.

"To J. & W. BLAKER, Newtown, Pa."

As security for its payment Myrick endorsed the receipt obtained from the railroad company and delivered it, with the draft, to the bank, which thereupon gave him the money for it.

The cattle were carried on the road of the Michigan Central to Detroit, and thence over the road of the Great Western Railroad Company to Buffalo, and thence over the roads of other companies to Philadelphia, the last of which was the road of the North Pennsylvania Railroad Company. They arrived in Philadelphia in about four days after their shipment, where, according to the uniform custom in the course of business in the railroad company, they were turned over to the Drove-Yard which was formed for the purpose of receiving cattle arriving there, taking care of them, and delivering them to their owners or consignees. This company notified the Blakers of the arrival of the cattle, and delivered them to those parties without the production of the carrier's receipt transferred by Myrick to the Commercial National Bank. The Blakers paid the expense of the transportation, took possession of the cattle, sold them, and appropriated the proceeds. The lot shipped on the 14th of November were delivered in like manner to the Blakers by the Drove-Yard Company without the production of the carrier's receipt, given to the bank, and were in like manner disposed of. Soon afterwards the Blakers failed, and the two drafts on them, one made on the shipment of Nov. 7, and the other on the shipment of November 14, were not paid. Hence the present action for the value of the cattle thus lost to the bank, Myrick suing for its use.

It appeared on the trial that Myrick had made previous shipments of cattle from Chicago to Philadelphia and taken similar receipts from the Michigan Central Railroad Company; but the cattle shipped had always been delivered by the Pennsylvania Company, at Philadelphia, to the Drove-Yard Company there, and by that Company delivered to the Blakers without the production of the carrier's receipt or any bill of lading; that the Blakers were dealers in cattle and had particular pens in the yards assigned to them; that the cattle of the shipments of Nov. 7 and November 14 were, on their arrival, placed by the superintendent of the drove-yards in those pens, and were sold by the Blakers on the following day, and that the carrier's receipt was not called for either by the railroad or the stock-yard company. It also appeared on the trial that Myrick bought the cattle for the Blakers, and that a person employed by them accompanied

the cattle from Chicago until their delivery at the drove-yard at Philadelphia; that the through rate from Chicago to Philadelphia on the cattle was fifty-eight cents per hundred; that notice of this rate was posted in the station of the defendant company at Chicago, and that it was not the custom of the railroad company at Philadelphia to look to the consignee for freight, but to collect it from the Drove-Yard Company.

The court was requested to give to the jury various instructions, one of which, though presented under many forms, amounts substantially to this, that as the road of the Michigan Central Railroad Company terminates at Detroit, the company was not bound, in the absence of special contract, to transport the cattle beyond such termination, and that the receipt of freight for a point beyond and an agreement for a through fare did not of themselves establish such a contract.

The court refused to give this instruction, or any embodying the principle which it expresses. On the contrary, it instructed the jury that the receipt, termed bill of lading, under the circumstances in which it was made, was a through contract whereby the defendant agreed to transport the cattle named in it from Chicago to Philadelphia, and there deliver them to the order of Paris Myrick, and to notify the Blakers of their arrival; that this was the undertaking on the part of the defendant company with the plaintiff Myrick, and with any assignee or holder of the contract. The facts attending the transaction not being disputed, there could be only one result from this instruction—a recovery by the plaintiff. From the judgment entered thereon the case is brought to this court for review.

FIELD, J. (after stating the case).—The principal question presented by the instruction requested by the defendant has been elaborately considered and adjudged by this court. It is only necessary therefore to state the conclusion reached.

A railroad company is a carrier of goods for the public, and as such is bound to carry safely whatever goods are intrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation

beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line, that is, to deliver safely the goods to such line—the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. This is the doctrine of this court, although a different rule of liability is adopted in England and in some of the States. As was said in *Railroad Co. v. Manufacturing Co.*, "it is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country, but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction." 16 Wall. 324.

This doctrine was approved in the subsequent case of *Pratt v. Railroad Co.*, 22 Wall. 123, although the contract there was to carry through the whole route. Such a contract may, of course, be made with any one of different connecting lines. There is no objection in law to a contract of the kind, with its attendant liabilities. See also *Insurance Co. v. Railroad Co.*, 104 U. S. 157.

The general doctrine then as to the transportation by connecting lines, approved by this court, and also by a majority of the State courts, amounts to this, that each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence. Although a railroad company is not a common carrier of live animals in the same sense that it is a carrier of goods, its responsibilities being in many respects different, yet when it undertakes generally to carry such freight it assumes, under similar conditions, the same obligations, so far as the route is concerned over which the freight is to be carried.

In the present case the court below held that by its receipt, construed in the light of the circumstances under which it was given, the Michigan Central Railroad Company assumed the responsibility of transporting the cattle over the whole route from Chicago to Philadelphia. It did not submit the receipt with evidence of attendant circumstances to the jury to determine whether such a through contract was made. It ruled that the receipt itself constituted such a contract. In this respect it erred. The receipt does not, on its face, import any bargain to carry the freight through. It does not say that the freight is to be transported to Philadelphia or that it was received for transportation there. It only says that it is consigned to the order of Paris Myrick, and that the Blakers at Philadelphia are to be notified. And after the description of the property, it adds: "Marked and described as above (contents and value otherwise unknown) for transportation by the Michigan Central Railroad Company to the warehouse at——," leaving the place blank. This blank may have been intended for the insertion of some place on the road of the company, or at its termination. It cannot be assumed by the court, in the absence of evidence on the point, that it was intended for the place of the final destination of the cattle. On the margin of the receipt is the following: "NOTICE—See rules of transportation on the back hereof." And among the rules is one declaring that goods consigned to any place off the company's line, or beyond it, would be sent forward by carrier or freightman, when there are such, in the usual manner, the company acting for that purpose as the agent of the consignor or consignee and not as carrier; and that the company would not be responsible for any loss, damage, or injury to the property after the same shall have been sent from its warehouse or station. Though this rule, brought to the knowledge of the shipper, might not limit the liability imposed by a specific through contract, yet it would tend to rebut any inference of such a contract from the receipt of goods marked for a place beyond the road of the company.

The doctrine invoked by the plaintiffs counsel against the limitation by contract of the common law responsibility of carriers has no application. There is, as already stated, no common-law responsibility devolving upon any carrier to transport goods over other than its own lines, and the laws of Illinois restricting the right to limit such responsibility do not therefore touch the case. Nor was the common-law liability of the defendant corporation enlarged by the fact that a notice of the charges for through transportation was posted in the defendant's station-house at Chicago. Such notices are usually found in stations on lines

which connect with other lines, and they furnish important information to shippers, who naturally desire to know what the charges are for through freight as well as for those over a single line. It would be unfortunate if this information could not be given by a public notice in the station of a company without subjecting that company, if freight is taken by it, to responsibility for the manner in which it is carried on intermediate and connecting lines to the end of the route.

Nor was the liability of the company affected by the fact that the notice on the margin of the receipt stated that the ticket given might be "exchanged for a through bill of lading." It would seem to indicate that the receipt was not deemed of itself to constitute a through contract. The through bill of lading may also have contained a limitation as to the extent of the route over which the company would undertake to carry the cattle. Besides, if weight is to be given to this notice as characterizing the contract made, it must be taken with the rule to which it also calls attention, that the company assumed responsibility only for transportation over its own line.

It follows from the views expressed that the court below erred in its charge that the ticket or bill of lading was a through contract, whereby the defendant company agreed to transfer the cattle to Philadelphia, and safely deliver them there to the order of Myrick.

Our attention has been called to some decisions of the Supreme Court of Illinois, which would seem to hold that a railroad company which receives goods to carry, marked for a particular destination, though beyond its own line is *prima facie* bound to carry them to that place and deliver them there; and that an agreement to that effect is implied by the reception of goods thus marked. *Illinois Central Railroad Co. v. Frankenberg*, 54 Ill., 88; *Illinois Central Railroad Co. v. Johnson*, 34 id., 389.)

Assuming that such is the purport of the decisions, they are not binding upon us. What constitutes a contract of carriage is not a question of local law, upon which the decision of a State court must control. It is a matter of general law, upon which this court will exercise its own judgment. *Chicago City v. Robbins*, 2 Black. 429; *Railroad Co. v. National Bank*, 102 U. S. 14, and *Hough v. Railway Co.*, 100 id. 213.

If the doctrine of the Supreme Court of Illinois, as to what constitutes a contract of carriage over connecting lines of roads, is sound, it ought to govern, not only in Illinois, but in other States; and yet the tribunals of other States, and a majority of them, hold the reverse of the Illinois court, and coincide with the views of this court. Such is the case in Massachusetts. *Nutting v. Railroad Co.*, 1 Gray, 502; *Burroughs v. Railroad Co.*, 100 Mass. 28. If we are to follow on this subject the ruling of the State courts, we should be obliged to give a different interpretation to the same act—the reception of

goods marked for a place beyond the road of the company—in different States, holding it to imply one thing in Illinois and another in Massachusetts.

The judgment must be reversed, and the case remanded for a new trial; and it is so ordered.

L'ABUS DES TITRES.

Il nous est venu souvent à l'idée d'exprimer notre opinion sur l'abus que l'on fait, dans notre pays, des titres de Chevalier et de Commandeur, appliqués à ceux qui ont été décorés d'un ordre quelconque.

La chose est opposée à tous les usages. Sur le continent européen, où tout le monde a plus ou moins l'ambition de porter une décoration quelconque, et même dans les pays où ceux qui ne sont pas décorés forment la minorité, on n'insiste pas à jeter à chaque instant les titres à la tête des gens.

Ici on a pris cette habitude à une époque où les décorations étaient très rares; il y avait au moins une excuse ou un prétexte. Maintenant que le nombre des personnages décorés atteint le chiffre de cinquante ou soixante, l'emploi de ces dénominations devient monotone d'abord, pour ceux qui sont ainsi bombardés à chaque instant de leur titre et de leur grade; et très difficile, parcequ'il serait important de ne pas se tromper.

Voit-on d'ici les électeurs allant voter pour monsieur le chevalier Beaudry; ou demandant des renseignements commerciaux à monsieur le Chevalier Cramp; ou exigeant de monsieur le Chevalier Keefer qu'il refasse son travail sur l'aqueduc de Toronto; ou que monsieur le Commandeur Coursol insiste pour une nouvelle nomination à la douane, et sur l'existence à perpétuité de la Commission Royale sur les Ecoles de Montréal?

Notre bon ami M. Drolet nous a épargné une bonne part de travail en nous adressant une note à ce sujet; il n'avait pas l'intention, probablement, de la rendre publique, mais nous profitons de son absence de la ville pour commettre cette indiscrétion:

Mon cher Rédacteur,

Dis donc, une fois pour toutes, à tes lecteurs et à tes confrères, avec prière de reproduire, qu'il est de très mauvais goût, (pour ne pas dire flageolant) d'appeler les décorés, comme on le fait tous les jours, "Monsieur le chevalier N..."

Demande leur donc comment on appellerait alors les grands officiers et les grand'croix?

On dit "Monsieur N...", chevalier de la Légion d'honneur, si on tient à lui rappeler à tout propos, qu'il "porte sa croix" dans ce monde, mais jamais "Monsieur le chevalier."

Autrefois, on arnait chevalier celui que le souverain anoblissait, et les cadets de famille prenaient le titre de "chevalier N..." mais il y a une nuance entre ce titre de noblesse et les différents grades des ordres de chevalerie modernes.

On m'a tellement donné du "Chevalier," que j'en suis placé dans une impasse très difficile: ou croire que c'est vrai, ce qui blesserait une modestie; ou dire que les autres commettent une bêtise, ce qui est toujours désagréable.

A toi,

La Minerve, Fev. 24.

G. A. DROLET.

The Legal News.

VOL. VI. MARCH 10, 1883. No. 10.

TO SUBSCRIBERS.

We would ask our readers to address all applications for copies of the journal to the Gazette Printing Company, publishers. Inconvenience and delay are caused by addressing such applications to the editor.

We are also requested by the publishers to state that they cannot undertake to replace copies which are mislaid or destroyed by subscribers. Where a number fails to reach a subscriber, notice by postal card should be given to the publishers within one month from the date of issue.

PEREMPTORY CHALLENGE.

In my note on Mr. McCarthy's proposed amendments to the criminal law, (*ante* p. 65) I was under the impression that it was the "stand aside" he desired to abolish, and I overlooked for the moment the Statute allowing the Crown four peremptory challenges on any trial. I have since seen the Bill, from which I learn that his object is only to repeal this enactment. There can be no objection in principle to its repeal, but one cannot help asking why the law should be again changed in this minute particular. R.

OATHS.

In the charge delivered by Mr. Justice Ramsay to the Grand Jury, at the opening of the Court of Queen's Bench, Crown Side, his Honor made the following observations:—

"Among the intellectual projects of the day it is proposed, we hear, to substitute for those who do not believe in the binding sanctity of an oath the subterfuge of an affirmation. As an oath necessarily includes an affirmation, it is somewhat difficult, for ordinary people, to understand how a man is to be bound by the one and not by the other. It will be observed that this proposed change is not intended to meet a difficulty analogous to that formerly raised by the Quakers and some other sects as to the use of God's name, which, from a narrow reading of the words of Scripture, they believe is prohibited. Their objection is not then the result of the disregard of a solemn undertaking; it arises from an over-scrupulousness, which to some may appear ridiculous, but which in no way menaces the basis of social order. The failure to observe this distinction and the love of change—a mania of small-minded people—have, probably, contributed more to encourage this proposed alteration than the repetition of the disturbances which suggested it."

These remarks were probably elicited by the measure which is to be submitted to the English Parliament; but since this charge was delivered, we have received a copy of a bill introduced by Mr. Robertson at Ottawa, to which the criticism of Mr. Justice Ramsay seems to be equally applicable. The preamble of the bill is "Whereas the discovery of truth in Courts of Justice has been signally promoted by the removal of restrictions on the admissibility of witnesses, and it is expedient to amend the law of evidence with the object of still further promoting such discovery;" and the first Section reads as follows:—"If any person called to give evidence in any criminal proceeding, or in any civil proceeding, in respect of which the Parliament of Canada has jurisdiction in this behalf, objects to take an oath or is objected to as incompetent to take an oath, such person shall, if the presiding Judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration: "I solemnly promise, affirm and declare that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth."

FEES ON LETTERS.

We have reported a number of decisions *pro et con* as to the right of an attorney to collect from the debtor by legal process a charge for writing a letter for his client, notifying the debtor that legal proceedings will be instituted in default of payment of the debt. Where the debt is not paid, and suit is entered, no fee for this service is ever taxed in favor of the plaintiff's attorney, for none is provided by the tariff. In the Circuit Court, however, some of the judges have been disposed to allow such a charge, on equitable considerations, where the claim is paid before entry of action. We do not see why any distinction should be made; the service is performed in each case alike, and the charge therefor should be allowed or rejected irrespective of subsequent proceedings.

The proper way to meet the difficulty is by amending the tariff, and making the fee taxable. It might be provided that a docket should be opened at the Court House, in which notice of suit should be entered, and the letter written (or printed) on paper bearing a stamp, say five cents for Circuit Court and ten cents for Superior Court cases. The amount of the fee should bear some proportion to the amount of the claim. A dollar and a half is too much for notice of suit for petty debts sometimes not exceeding that sum. We would suggest a mere commission of 20 per cent. on amounts less than five dollars, and a fee of one dollar with five per cent commission on amounts from \$5 to \$25: on claims over that sum the fee to be \$2.50. Of course the entry of the notice of suit would be compulsory only where the attorney desired to have the benefit of taxation.

NOTES OF CASES.

SUPERIOR COURT.

BERTHIER, Feb. 21, 1883.

Before DOHERTY, J.

GENEREUX et al. v. CUTHBERT.

Dominion Controverted Election Act, 1874 — The Berthier Election Case — Evidence — Bill of Particulars—Corrupt Act — Passes — Limited Agency — Money paid by candidate to canvasser.

1. *Evidence of corrupt acts and bribery is not admissible under a bill of particulars in which the names and descriptions of the alleged bribers are not given.*
2. *Passes, which were not paid for by the giver, presented to electors to take them to the polling place, do not constitute a "valuable consideration" within the meaning of the Act.*
3. *Telling a carter who was asked to bring a voter to the poll, "tu feras ton compte, et tu iras te faire payer," even if the words were used by an agent of the candidate, is insufficient to avoid an election.*
4. *Where the agency of a person is limited to a particular act, e.g. making a speech for a candidate, and subsequently that person is guilty of an act of a doubtful character, he will not be deemed an agent of the candidate merely because he had been employed for a special purpose.*
5. *The advance of a sum of money by a candidate for the travelling expenses of a canvasser, who was also an agent and a voter, will not be held to avoid the election, where the Court is of opinion that the advance was made in good faith, though the item was subsequently omitted in the candidate's statement of personal expenses.*

DOHERTY, J. Early in the course of this trial, counsel for respondent raised an objection to any evidence of alleged corrupt acts and bribery, under particulars in which the names and description of the alleged bribers were not given.

The question being debateable and important, I ordered, in some cases, the evidence to be taken under reserve.

My first duty now is to decide that objection, and after examination of the authorities on this point, I maintain the objection. The authorities and the practice are decidedly in favor of this decision.

Fortunately, the question arose only in the cases which were abandoned by petitioners at

the hearing, and the decision is now in this case immaterial.

A petition is presented, in the usual form, as to corrupt practices, without claiming the seat. This petition is supplemented by a Bill of Particulars, consisting of twenty-six specific heads or charges.

Respondent answers these charges by a general denegation, alleging at the same time petitioner's want of quality or right to petition against the validity of the election, which right was afterwards admitted, thus bringing the case to a direct issue on the merits.

Petitioners have called witnesses, in moderation as to number, and respondent has examined but few in rebuttal.

At the hearing, petitioners very properly abandoned as unproved, all but five of their charges, persisting in the 1st, 2nd, 8th, and 20th, and in the additional particular, A, which among others, they were permitted to produce.

The grounds of the petition, as articulated, are fully sufficient in law, and if petitioners have proved them, or any one of them, the election must be avoided.

The first charge, which may be designated as the "Lamarche case," so persisted in, is in the following terms:

"Que pendant la dite élection, le dit Edouard Octavien Cuthbert, directement et indirectement, par lui-même, par le moyen d'autres personnes, et de ses agents autorisés, et entr'autres par Olivier Lamarche, marchand de Berthierville, district électoral de Berthier, de la part et le consentement et à la connaissance réelles du dit Intimé, a payé les dépenses de voyage et autres dépenses, d'un grand nombre d'électeurs du dit district électoral de Berthier, pour les aider à se rendre à l'élection, et à s'en retourner, à se rendre aux, ou aux environs des bureaux de votation, et entr'autres à Octave Boucher, Jean Baptiste Godin, Alexandre Godin, Narcisse Boucher, Louis Valois, Pierre Latour, tous navigateurs de l'Île Dupas, dans le district électoral de Berthier; Joseph Plouffe, Alfred Bruno, Dolphis Rocrais, Dolphis Massé, Servius Massé, Joseph Pagé, Octave Parent, tous navigateurs de Berthier, dans le dit district; Lafontaine, de Québec, employé civil; Narcisse Boucher, navigateur de Trois-Rivières, district de Trois-Rivières; Pierre Arpin, navigateur de Lanoraie, dit district de Berthier; Dolphis Buron, navigateur de Berthier, district électoral de Berthier; Charles Rocrais, navigateur du même lieu; Alfred Chignette, maître de pension de Montréal, district de Montréal; toutes ces personnes étant électeurs de la division électoral de

"Berthier, et dument qualifiés à voter à la dite élection, et ayant voté à la dite élection, donnaient à chacune des dites personnes, un billet de passage sur le chemin de fer Québec, Montréal, Ottawa et Occidental, et autres valeurs et d'autres manières, pour les conduire dans le dit district électoral de Berthier, aux, ou aux environs des bureaux de votation, où chacune des dites personnes avait respectivement droit de voter, et que les dites personnes ont ensuite revendu les dits billets de passage, qu'ils avaient ainsi obtenu gratis, et dans un but frauduleux, illégal et de corruption, et pour les engager à voter pour le dit Intimé, et ont retiré de ces ventes des sommes d'argent ou autres valeurs qu'ils ont gardés pour leur usage personnel exclusif."

In support of this charge, Olivier Lamarche and several of the persons and voters therein referred to, have been examined and given testimony. The proof of this charge summarized, shows that Lamarche was a strong partisan and supporter of respondent, was a member of his committee, canvassed some and was engaged and interested in favor of respondent, and was therefore, as petitioners contend, his agent.

Lamarche's place of business was Montreal, his family residing in Berthier, and this led him to spend part of his time at home and part in Montreal. Having acted on the committee for some time previous to the election day, it appears by his evidence that he was as usual, for business, in Montreal the day before the voting, and that on the forenoon of that day, believing that there were voters employed on the steamboats "Three Rivers," "Chambly," "Terrebonne" and "Quebec," he went on board of these boats to see these employees, and to know if they wished to go to Berthier to vote on the following day.

In proof of what took place between him and these men, and all that passed between them and him, material in or relevant to this charge, he says in his deposition, and in his own words and language in answer to this question :

Question.—"Avez-vous été à Montréal, et à la demande de qui, pour vous informer où étaient certains électeurs de Berthier, employés sur les bateaux de la Compagnie de Richelieu ?"

Réponse.—"J'ai été à Montréal comme d'habitude, parce que j'ai mon bureau là, mon bureau d'affaires. J'ai été navigateur moi-même, et je connais tous les navigateurs. Je connais nos ennemis et nos amis. J'ai été à Montréal à bord du bateau "Trois-Rivières," à bord du bateau "Chambly," du bateau

"Terrebonne," et à bord du bateau "Quebec." J'ai demandé à ceux que j'y connaissais si un tel et un tel y était, on me disait que oui. Je les voyais, je leur demandais s'ils voulaient descendre voter à Berthier, pour l'élection. Dans toutes les élections qui ont eu lieu, l'été, j'ai toujours fait cette besogne-là."

He is asked, "Où avez-vous pris les billets de passage que vous avez distribués à ces électeurs, pour venir voter ?"

Answer.—"Ils m'ont été donnés sous enveloppe. Lorsque ces billets m'ont été donnés c'est par un homme que je ne connaissais pas dans le temps. Je le connais depuis trois ou quatre semaines. Son nom est Grondine, son nom de baptême, c'est plus que je peux vous dire. Je sais qu'il était engagé dans ce temps-là, dans le bureau du Q., M., O. & O. (Railroad.)"

Question.—"Dans quelles circonstances vous a-t-il remis ces billets ?"

Answer.—"Il m'a dit, "Voici une lettre qui a été laissée pour vous," c'était dans le bureau du chemin de fer du nord."

The witness says he had spoken to J. B. Labelle, the ticket agent of the railroad before this, and that Labelle said he would give him passes as usual (comme d'habitude) to go to Berthier; witness telling him that he wanted 17 to 20, which he gave to the voters above referred to, giving one to each, seven or eight of them whose names he gives, and left some of them with Capt. Duval, of the "Trois-Rivières" to be given to the other voters.

It is proved by this witness as well as by the men who received from him the passes, that a number of them, 8 or 10, travelled on the railroad on these passes from Montreal to Berthier, and there and in that vicinity voted. These men, examined as witnesses for petitioners, state the nature of Lamarche's interview with them on the boats with regard to their coming to vote, substantially as he does, and state also that he gave them the free passes to Berthier on the railroad.

That Lamarche gave passes, from 17 to 20, and that he gave them to the voters referred to, and that they travelled free on them from Montreal to Berthier to vote, and voted there, is not and cannot be disputed, and the questions now to be answered are: Was Lamarche respondent's agent, and if so, does what took place between him and the voters referred to, and his giving them the passes amount to bribery and corrupt practice within the meaning of the Dominion Election Act, 1874? Has Lamarche, as such agent, done, promised, or

said anything *corruptly* to induce the above mentioned persons to vote for the respondent or to act in furtherance of his election, or to constitute a violation of the 96th section of the Act, and consequently to avoid the election under this section; and if not, was the giving of the passes in question a violation of section 92, sub-sections 1 and 3, and consequently a corrupt practice within the Act?

I think the evidence of Lamarche himself and of Louis Tranchemontagne, although not *very* strong, under all the circumstances sufficient to constitute him respondent's electoral agent and to hold him, respondent, responsible for his acts as such in relation to the election.

I need hardly say that I come to this conclusion after a careful reading of the authorities cited at the argument, and others not cited,—and here I wish to say that I do not propose to lengthen this judgment by incorporating citations of authority, with which the profession and more particularly the gentlemen engaged in this case are already familiar, whilst such citations would be but of doubtful value to the ordinary non-professional reader.

The next question to be answered under this first charge or head of objection is this: Has the respondent or his agent violated the 96th section of the Act by "Hiring or promising to pay, or paying for any horse, team, carriage, cab, or other vehicle, by any candidate or by any person on his behalf, to convey any voter or voters, to or from the poll, or to or from the neighbourhood thereof at the election."

Under the provisions of sec. 98, a violation of sec. 96 is a corrupt practice, is bribery, and consequently attaches, to both principal and agent, a highly penal breach of the law, and entails upon them both very severe punishment; hence, and by all the authorities the proof of such violation must be strong and conclusive. Have we proof of such violation in this case? I think not. There is no satisfactory or sufficient proof of the hiring or promising to pay, or paying for any horse, team, &c., as prohibited by the section, or of the payment of travelling and other expenses of any voter in going to or returning from the election in question, nor of any unlawful acts in respect thereof to affect either the respondent or the agent, and consequently no proof of

corruption under this charge within the meaning of the Act. On the contrary, I am satisfied from the proof and circumstances that the railroad ticket agent, with what degree of propriety it is not for me to decide here, gave the passes on which said voters went to the polls gratis, and that they were never paid for, nor promised to be paid for, and that the proof fails to bring the charge under this head of objection within the provisions of the said 96th section of the Act, and the respondent is entitled to a finding in his favour in this particular.

But the petitioners contended at the argument that the passes given to the voters by Lamarche were things of value, and that they were given as a "valuable consideration" to induce said voters to vote for respondent at the election; thus *arguendo*, contending that respondent by his agent had made himself amenable to the provisions of sec. 92, sub-sec. 1 of the Act, and thus that he was guilty of bribery through his agent within the meaning of said section.

This proposition raised the question which has not, so far as I know, been as yet extensively discussed in the trials of election cases, as to whether a Railroad pass given *gratis* and unconditionally to a voter to go to vote, is within the meaning of the Sec. 92 Sub-section 1, a "valuable consideration" or of any such value as would support a promise.

In disposing of this question I cannot do as well as to refer to the judgment of Mr. Justice Mellor in the Bolton case, 2nd O'Mally & Hardcastle, pp. 147, 8, 9.

Before seeing this authority (for I think it was not referred to at the hearing) I felt inclined to say after much anxious consideration, that tickets, given as those in question were, were not "valuable consideration" in the sense of, or within the meaning of the Act. In my uncertainty on this point, I need not say that I felt relief in finding authority so strong and in the direction of my own timid inclination.

I am of opinion that the passes so handed to these voters unpaid for, as Lamarche swears on cross-examination, and presented to the voters under the circumstances proved in this case, do not constitute the "valuable consideration" to them contemplated and prohibited by the statute, and that the passes in question are not such consideration within the meaning and in-

tent of Sec. 92 of the Act, and I find that Petitioners have failed to establish the said first charge of bribery and corrupt practices against the respondent or his agent.

Now as to the Côté & Rithier case. The second charge in the Particulars is made in the following words :

"Que pendant et depuis la dite élection le dit Edouard Octavien Cuthbert directement et indirectement par lui-même, par le moyen d'autres personnes et de ses agents, autorisés, et entr'autres par Adeline Côté, maire de St. Barthelémy, district électoral de Berthier, a loué, promis payer et payé pour l'usage de chevaux attelages, voitures, cabriolets, et autres véhicules pour transporter des électeurs aux et près des bureaux de votation, et nommément à Joseph Rithier, charretier du dit lieu de St. Barthelemy, promettant de lui même et lui ayant donné des sommes d'argent et autres valeurs pour aller chercher avec sa voiture Joseph Savoie de St. Ursule, Comté de Maskinongé, et électeur dument qualifié à voter à la dite élection, et l'amener voter au dit lieu de St. Barthelémy, ce que le dit Joseph Rithier a fait."

In support of this charge Petitioners call and examine Rithier, assuming Côté to have been Respondent's agent in this case.

Côté's evidence, beginning on page 205 of the proof, shows that he was, when the election took place, Mayor of St. Barthelémy, that he voted, that he took an active part as usual in elections, that he knew of no committee at St. Barthelémy. They met as friends from time to time, he says. They met indirectly all those who wished to come; it was not always the same persons who were present at the committee. We met ordinarily at Remi Désy's, many persons went there. I went there the evening of the day of the voting. I met a certain number of persons there, three or four strangers to the family . . . at St. Barthelémy. They did not call our meetings a committee. We met once a week &c.

In short, Côté gives no evidence that can lend any support whatever to this 2nd charge. Rithier's deposition is more pertinent, and carefully summarized, is in effect as follows :

He was a carter at St. Barthelémy and had the right to, and did vote at the election. I went, he says, to bring an elector before voting, one George Savoie, six leagues and a half. I went the day before the voting. Savoie is my cousin. It was M. Côté that asked me to go for him, Adeline Côté.

Question.—"Qu'est-ce qu'il vous a dit quand « il vous a demandé d'aller là ?

Réponse.—"M. Côté m'a vu le dimanche. Il m'a demandé si je voulais aller à Ste. Ursule chercher George Savoie. Il a dit, 'si tu allais il viendrait peut-être bien avec toi.' J'ai dit, 'c'est bon, je m'en vais y aller.' Je suis parti le lundi, je suis allé coucher là, et je l'ai mené voter. Je n'ai rien reçu ni il m'avait promis rien. Bien loin de là, il m'a dit qu'il ne m'en donnerait pas, qu'il n'avait jamais fourni un sou de sa poche pour les élections, qu'il ne me paierait pas, lui.

Question.—"Mais a-t-il été question que d'autres devaient vous payer ?

Réponse.—"Non, monsieur, seulement qu'il m'a dit, *ce que j'ai compris*, le dimanche que j'ai parlé, 'tu feras ton compte et tu iras te faire payer.' Je comprenais que je devais faire payer mon compte à Berthier. Il ne m'a pas dit à Berthier, je comprenais que c'était ici."

This witness says that Côté took part in elections like all the rest. "We were coming from the church after mass when I had this talk with Côté. When he asked me, I said I would go there, he said 'tu porteras ton compte et tu te feras payé,' mais il ne m'a pas dit qu'il me paierait. J'ai compris que ce serait payé."

The foregoing is the substance of Rithier's evidence on this charge, and I have quoted of it what materially bears on this single isolated case of alleged *hiring of teams*.

To avoid the election on this charge, there must be proof to the perfect satisfaction of the judge of two things ;

1st. It must be established beyond reasonable doubt that Côté was respondent's agent in this matter.

2nd. That he did, as such, hire or promise to pay, or pay Rithier for going to St. Ursule to bring Savoie to vote, or that he paid the travelling and other expenses of the voter Savoie in coming to or returning from the election.

I see no proof at all sufficient to establish such agency. I find no evidence to show directly or indirectly any connection or joint purpose, or action of respondent and Côté, nothing in fact to show that they had seen or spoken to each other on the subject of the elections, or any connections or relations whatever between the respondent's committee at Berthier and Côté or any other person or body with whom he was associated in furthering the election of respondent. In a word, I find nothing in the evidence given to in any way implicate respondent in anything Côté did or said with reference to the election.

Now if the conclusion thus arrived at be

correct, then it were useless to argue whether Rithier's horse and vehicle were hired by Côté, as alleged, or whether he paid or promised to pay travelling expenses. I may say, however here, that if the decision in this case depended on the interpretation to be put on the peculiarly vague expression, "Tu feras ton compte, et tu iras te faire payer," (and this is the only expression attributed to Côté, that at all looks like a promise to pay Rithier), taking his, Rithier's, deposition all together, the cross-examination included, I could not and would not avoid this election. I do not think this expression, even if made, would be a promise within the meaning of the Act.

I consider the respondent entitled to an acquittal on this charge.

It appears of record that Côté was subpoenaed to contradict Rithier. He sent a doctor's affidavit that he was too ill to come.

Next as to the case of Hénault and Maxwell. The eighth articulation of the particulars charges :

"Que pendant la dite élection, le dit Edouard Octavien Cuthbert, directement et indirectement par lui-même, par le moyen d'autres personnes et de ses agents autorisés, et notamment par Joseph Hénault, graveur, de la cité et du district de Montréal, a donné, est convenu de donner, a offert et promis des deniers, a promis et s'est efforcé de procurer des deniers et autres valeurs à et pour un grand nombre d'électeurs habiles à voter à la dite élection et ayant voté à la dite élection, et particulièrement à Joseph Maxwell, cultivateur, de St. Maurice, dit district, électeur habile à voter à la dite élection, et ayant voté à la dite élection, afin de l'induire et de les induire à voter à la dite élection en faveur du dit Edouard Octavien Cuthbert."

On this head of objection to the election the petitioners have called three witnesses, Maxwell, St. Cyr, and Henault.

Maxwell is an old man, evidently enfeebled in body and consequently more or less so in memory. His deposition is therefore confused and unsatisfactory in the less pertinent parts thereof on cross-examination. He states, however, substantially, beginning on page 74 of the evidence, in French, that he was a voter entitled to vote, and that he voted at the election in question.

He says that he knows now Joseph Henault who came to St. Damien on the Sunday before the election, and gave or left with him \$25, he not knowing then from whom it came, and that

he at first refused to receive it for this reason, and that it was left by Henault until this fact should be ascertained. Who was this Henault, who gave him the money, and what was his relation to, or connection with respondent and the election ?

The witness St. Cyr throws some light on these questions. He says, on his way home from Montreal on the Saturday before the voting, George Daveluy of Montreal (who is not otherwise shown to have had anything to do with the election) gave him a sealed letter at Hochelaga to be forwarded to Maxwell, and that on arriving at Mile End station Daveluy told him there was money in the letter and to pay attention to it. On St. Cyr's arriving at Berthier the same forenoon, meeting Lamarche in the street he asked him who was going to St. Damien and that Lamarche told him it was a person named Henault. He asked for Henault and gave him the letter, telling him that it is "a letter which was given to me for Mr. Maxwell, I am told there is money in it." Henault was to go to St. Damien the following Sunday morning to speak for Respondent at the Church after mass, expecting to meet there as an adverse speaker Senator Guevreumont. He went, made a speech for Respondent and delivered the letter and money to Maxwell.

This money, coming to Maxwell in this somewhat mysterious and roundabout manner, just before the polling day, was certainly calculated to arouse suspicion, and if it can be traced, directly or indirectly to Respondent or an agent of his, must disqualify or annul the election, or both. Now there is no proof of agency on the part of Daveluy and none at all on the part of St. Cyr sufficient to compromise Respondent or to affect the election. To do so, as to agency the proof ought to be strong, clear and conclusive, which it is not.

As to Henault this was his first visit to this division. He was a stranger there for aught that appears. There is no proof that he was asked to come by anybody authorized by Respondent or by any agent of his. Henault did not leave Montreal in order to come to this division, but to go elsewhere and was diverted from his purpose to come here. He arrived in Berthier on Saturday evening, the eve of his going to speak. He knew none of the Committee. The President or some other of the

Committee told him, you will go to St. Gabriel and then to St. Damien. He was sent there to speak at St. Damien after mass. He did so and left the money with Maxwell as stated, but did not in any way canvass or ask his vote. He returned to Berthier and represented the Respondent at one of the polls on the next Tuesday at the voting, under power of attorney to do so. He says on cross-examination in answer to the question :

Question.—“ Pourquoy étiez-vous venu dans le comté ?

Réponse.—“ J'étais venu * * * pour faire la discussion au nom de monsieur Cuthbert dans quelque paroisse où il voudrait m'envoyer.

Question.—“ Vous étiez venu pour parler à la porte de l'église, pour parler le dimanche ?

Réponse.—“ Oui.

Question.—“ Vous avez représenté le défendeur au poll de l'île St. Ignace ?

Réponse.—“ Oui.

Question.—“ A part cela vous n'aviez aucune autre mission ?

Réponse.—“ Aucune autre.”

(f) Daveluy's motives in sending the money to Maxwell, we have no proof. He was not respondent's agent, and Maxwell swears positively that it had nothing to do with this election, stating explicitly at the same time and showing another cause for its having been sent to him which looks reasonable enough, and which the fact that the election of Robillard of whom Maxwell was a zealous partisan took place as stated by him, corroborates.

It is undoubtedly true that Hénault came to the division to speak as he says for respondent. As a general agent or canvasser, he would have been useless as being a stranger. He knows nothing of the letter and money referred to until after his arrival here. There is no proof that respondent or his committee knew of his having such a letter or of his coming, until after his arrival. He swears it was not spoken of to the committee and nothing appears to the contrary.

The charge here really in question is one of bribery by respondent through Hénault, and if he were his agent or sub-agent at the time, and this fact were not so positively denied or accounted for by Maxwell, it would undoubtedly avoid the election.

The only proof of his agency apart from his representing respondent at the polls on election day, is the fact that the committee sent Hénault, the Sunday before the polling, evidently with the knowledge and consent of respondent, to speak for him at the church door at St. Damien, after mass. This appears to be the only act done or part taken by him in connection with the election (except representing as stated) and after much consideration, I am of opinion that the committee by sending him for this special purpose did not make or intend to make him respondent's agent, to act as such generally

at his own discretion, and that this is the case of a special limited agency, and that what passed between Hénault and Maxwell was entirely out of and beyond the scope of his authority from the committee, expressed or implied.

He is told by the committee to go and make a speech at a certain fixed time and place, and having done so, his thus limited agency is at an end.

The mysterious manner in which this money was conveyed to Maxwell, I confess awakened suspicions at first sight and challenged a most careful scrutiny of all the facts, but I cannot disregard the evidence given by Maxwell, corroborated by the circumstances of the Robillard election, nor can I say that what passed between him and Hénault, can do aught to affect respondent or his election now in question.

The last and most serious charges relied on by petitioners, are the 20th and the supplementary particular marked A which may be taken together as one, under which it is more particularly sought to implicate and disqualify the respondent for acts, or more especially an act of personal bribery. They read thus, 20th, “ Et les dits pétitionnaires allèguent spécialement que toutes et chacune des manœuvres frauduleuses illégales et corruptrices ci-dessus mentionnées, ont été employées à la connaissance et du consentement réels du dit intimé, se réservant le droit de produire d'autres particularités si besoin est.”

And charge A. “ Le dit défendeur par lui-même et ses agents duement autorisés à cet effet, ont donné et avancé pendant la dite élection au dit lieu de Berthierville, à J. O. Chalut, écuyer, notaire de Berthierville, une somme d'argent, savoir : la somme de vingt-cinq piastres pour l'engager à favoriser l'élection du dit Cuthbert, et à voter pour lui.”

The evidence under this first particular is directed against respondent personally; and respondent himself, J. H. Chalut, and Louis Tranchemontagne are the principal witnesses called and examined in support of it.

Their evidence, summarized, is substantially as follows :

Chalut, who was a zealous supporter of respondent, and President of the committee, says, “ Je connais le défendeur très bien. J'ai travaillé pour son élection, ici dans la ville et à St. Gabriel et Brandon. Je me suis retiré dans un hôtel, et là je faisais venir ceux que je voulais voir. Je faisais le travail qu'on fait ordinairement quand on travaille pour favoriser un candidat. J'ai reçu \$20, je ne sais pas de qui, je vais vous raconter sous quelles circonstances.”

He says, the Monday or Saturday preceding the voting, at a meeting of friends at the committee, we discussed who would go here and there, as is customary; there was a question of some one going to St. Gabriel for eight days, I suppose before the voting. The name of Louis Tranchemontagne and

mine were mentioned. L. Tranchemontagne objected to go, and they decided I should go. I said I would go, if absolutely necessary, but that it was difficult for me to go unless somebody would give me money to pay my expenses. I returned to my house. In the afternoon of Tuesday, a carter came to my house, saying, "Here is a letter—they sent you to go to St. Gabriel." Another person was with the carter; one of them handed me the letter to start at once. I opened the letter and found \$20, and went off.

Witness says defendant knew he was president and working for him. He thinks it was Albert Cuthbert, son of the defendant, who did errands for the committee, that gave him the letter.

The rest of this witness' evidence bears less directly on the material question in this charge.

Respondent himself, examined, says he knows Chalut, the last witness, that he was present when there was question in the committee, though taking no part, about sending some one to St. Gabriel. Chalut was fixed upon to go. He reported that he would go but could not afford the expense. There was talk then of giving him the money to go. Some said we had the right. Others said they were not sure it was legal. I took the responsibility, and went to my agent, Col. Hanson, to ask him to send him the money for the expenses of the trip. My agent was absent, not to return for some time, and we were in a hurry. I then sent him \$20 in an envelope, for his expenses for his trip, and omitted to enter it in my account. I forgot altogether. I kept account of my personal expenses, and don't know how I omitted that. I forgot altogether.

Here, the giving of the money, on which this charge is based, is fully and frankly admitted by the defendant, and Tranchemontagne's evidence does not weaken the admission, and there now but remains the question of law: Will the giving of this sum of \$20, under the circumstances, and for the purpose of paying travelling expenses of a canvasser, who is at the same time a voter, by the sitting member, avoid the election and disqualify him? And is such a giving a corrupt practice, bribery, within the meaning of the Act?

By this charge, and the proof thereon made, it is sought to make the defendant personally guilty of the violation of the third sub-section of Section 92 of the Act.

The provisions of this section are severely penal, disgraceful and humiliating as against the guilty, and hence the evidence to establish guilt must be such as would justify the judge in charging the jury, if defendant were indicted under this sub-section, that there was, in his opinion, sufficient evidence to convict.

Now, apart from the authority of decided cases, bearing directly on this branch of the case, if the defendant were under trial on such an indictment, would the proof made of this

charge justify a judge in so charging, or a jury in so finding? Were the \$20, advanced to Chalut for expenses, as stated in the proof, given corruptly to induce him to endeavour to procure the return of defendant, or the vote of any elector at this election?

In view of the relations shown to have always subsisted politically and otherwise between him and Chalut; he, Chalut, being at the time in question, and before, actively engaged as president of the committee in endeavouring to procure such return, and doing all he could for defendant as he had formerly done, as one of his most zealous supporters, and in view of the authorities cited at the argument on the question of canvassers, being electors, paid or not, I am of opinion that in so giving the \$20, the respondent did not commit a corrupt act, nor make himself guilty of a corrupt practice within the intention and meaning of the section and sub-section referred to.

In support of this conclusion I cannot do as well as to refer to the remarkably able and exhaustive judgment of Chief Justice Meredith, in the Quebec East case; *Gingras et al. v. Shebyn*; Volume I. Q. L. Rep., p. 295 et seq. See also the *Tamworth Case*; Mr. Justice Willes; *O'Mally & Hardcastle*, vol. I. pp. 75, 78 and 79; *The Coventry Case*, same Judge, vol. I. pp. 97, 100 and 101; *The Lambeth Case*, *Wolferstan & Dew*, pages 132 and 133; *North Riding of the County of Ontario case*, *Wheeler*, appellant v. *Gibbs*, respondent, vol. 4, *Supreme C. of C. Reports* p. 430 and seq.; *Fournier and* (inferentially in this case) *Gwynne, JJ.*

From these authorities and others that might be cited, and the relations between respondent and Chalut referred to, the length of time—8 days—that it was intended he should be absent at St. Gabriel, and the moderate sum—\$20—for expenses during such time, I have no hesitation in saying that that sum was given Chalut *bona fide* and not colorably or corruptly, and that in advancing the same as respondent did under the circumstances, he neither intended to nor did commit an illegal or corrupt act, and that petitioners have failed to establish this charge of personal bribery against him. And after careful, and on some points anxious consideration of the evidence adduced, the application of the law, and of many of the leading decisions in election cases, I am of opinion that the respondent was duly elected and returned, and I will so certify.

As to costs: from the way in which some things were done in connection with the election, and others by omission or forgetfulness left undone by and on behalf of the respondent, I cannot say that the petition was frivolous or vexatious, and it is therefore ordered that each party bear their own costs.

Petition dismissed.

Mercier, Beausoleil & Martineau, for petitioner.
Lacoste, Globensky & Bisailon, for respondent.

The Legal News.

Vol. VI. MARCH 17, 1883. No. 11.

CRIMINAL LAW AMENDMENTS.

We have received a copy of Mr. Cameron's Bill to extend the provisions of the Act respecting offences against the person, as amended in Committee. It is now reduced to three clauses applying to sexual intercourse, (1) between parent and child; (2) between brother and sister of the age of fifteen or upwards; and (3) between grandparent and grandchild. Persons offending shall be deemed guilty of felony, and the punishment enacted is imprisonment, not exceeding ten years, in gaol or penitentiary.

Offences of the character to which the Bill applies, have happily been so rare that serious doubts were expressed in Parliament as to the propriety of putting such a measure on the statute book. Some time ago, however, we read in the charge of a Judge to the Grand Jury, in one of our rural districts, that the offence was on the increase in the country. If it be so, we suspect that it proceeds from causes which will be only slightly affected by the punishment enacted by Mr. Cameron's measure. The horror which this offence inspires is so universal that probably none but those who are naturally of weak intellect, or who have been degraded by various causes to the level of brutes, are guilty of it. Reference was made in the House to the execution of Burns at Montreal. In that case the prisoner, if we remember aright, had been long living with his family, in nearly total solitude, in a remote district; and further, the case stands almost alone in our criminal annals. If the existence of the evil be recognized, it should be combated by the spread of education and enlightenment, and the vigilance of priest and missionary. The locking up in our gaols or penitentiaries of imbeciles, or those who are all but imbecile, cannot be expected to do much towards bringing about a better state of things.

APPEALS FROM SUPREME COURT.

The Judicial Committee of the Privy Council have recently granted leave to appeal from two decisions of the Supreme Court of Canada—one is in the case of Mr. Doutre, Q.C., a suit for professional services, and the other is the case of *McLaren v. Caldwell*, 5 L. N. 393.

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, Feb. 28, 1883.

TORRANCE, J., RAINVILLE, J., JETTE, J.

[From S. C., Beauharnois.

QUIMET *es qual.* v. FONTAINE.

Action against Secretary Treasurer of Municipality—Delivery of books, etc.

A secretary-treasurer of a municipality may be condemned to deliver up the books, papers, and monies of the municipality, and also to pay the penalty for default to make delivery.

TORRANCE, J. This was an action by the superintendent of education, under 40 Vict. c. 22, against the defendant, as having been secretary-treasurer of the municipality of the parish of St. Antoine de Chateauguay, to have him ordered to deliver up to the president of the Commissioners of the municipality, the books, papers, and monies of the municipality, and also to have him condemned to pay a sum of \$1,000, being \$20 per diem for his defaults in not making such delivery between the 21st October, 1880, and the 9th December, 1880. Judgment went against the defendant for \$250 for his defaults, being \$5 per diem, and he was ordered to make delivery of the books, papers, and moneys in question. The defendant made a variety of objections to the demand.

1. As an official, he was entitled to notice of action, and no notice, he says, was proved. We find, as the court has already found, notice duly served.

2. He complains of *cumul d'actions*, and denies the right to demand at the same time, the order for delivery of the books, etc., and for the penalty. This has been ruled against him by the court, citing 40 Vict. c. 22, s. 22. We find no error here.

3. He also sets up the engagement with the corporation of St. Antoine Abbé, whereas the demand was by the corporation of St. Antoine de Chateauguay. It was explained and proved that the description of St. Antoine Abbé was a clerical error, and that the corporation which complained was the corporation with which the defendant contracted.

4. The defendant also complained of a *faux* in the resolution by which he was removed from office, alleging that no such resolution was passed or recorded, on the 2nd October, 1880. This was also rightly ruled against him.

5. He also objected that the resolution appointing his successor, did not remove him. Here again he was unsuccessful, as also in the objection that the chairman of the meeting was not duly qualified. We have no hesitation in confirming the judgment.

L. A. Seers and Lacoste, Globensky & Bisailon, for plaintiff.

T. Brossoit and R. & L. Laflamme, for defendant.

COURT OF REVIEW.

MONTREAL, Oct. 31, 1882.

MACKAY, TORRANCE, MATHIEU, JJ.

[From S.C., Montreal.

LES COMMISSAIRES D'ECOLE DE ST. HENRI v. DESMARTEAU et al., and LA VILLE DE ST. HENRI, and PLAINTIFFS, parties collocated, and McLAREN, contesting.

Prescription—Interruption — C.C. 2229 — Ventilation.

A hypothecary creditor may invoke the prescription acquired by his debtor as to municipal taxes notwithstanding the renunciation of the debtor.

A hypothecary creditor is entitled to ask for a ventilation, where it appears that by taxing a number of lots en bloc, the taxes due on a much larger extent of property were imposed on a portion, the proceeds of which are being distributed.

The inscription in Review was on a judgment of the Superior Court, Montreal, June 30, 1882. In pronouncing judgment the following observations were made by the Judge *a quo* :—

JOHNSON, J. The town of St. Henri is collocated by the 7th item of the report, for municipal taxes, and the School Commissioners for School taxes, by item 5.

The contestant is a large hypothecary creditor, and he contests both of these collocations.

First, as regards the collocation of the Town : it is first of all to be reduced by the amount of arrears of taxes charged for the years 1876, 1877 and 1878, which are prescribed by law. It was said there had been an interruption of this prescription by payments made by Wilson who formerly held the *baillieur du fonds* claim now held by the contestant, but the articles 2187 and 2229 C.C. apply here, and the third party can oppose the prescription, even when the debtor renounces, which, however, as a matter of fact, is not clearly seen here. This is the first point in the case, and it has the effect of deducting at once from the collocation No. 7, the sum of \$443.

Then there are two other questions raised. It being admitted by Desève, the Secretary Treasurer, that these taxes were imposed by error, it would seem that the defendants, or the contestant as their creditor, should be allowed to plead such error. It was argued that the valuation roll was final. Without going into that at all, and more particularly without looking at it as regards third parties, a mortgage creditor like the contestant is surely entitled to complain of the fact, if it is a fact, that several distinct properties were taxed *en bloc*, if that fact whether irrevocable or not subjects him to the injustice of making a few lots pay the whole that is due upon a much larger number. He may say, your valuation roll may be very good as far as it goes, but it cannot make me pay in an arbitrary manner. I am entitled to a ventilation to see what proportion of the taxes ought to be borne by the lots sold, and what by those taxed but unsold. Whatever the effect of a valuation roll, surely it cannot have the effect of taxing the property of a third party to pay what neither he nor it owes. It is not necessary however to decide that now. The ventilation is necessary on account of the taxes imposed on what are used as streets. Therefore as to this question of proportion between the subdivision lots sold and those unsold, the Court orders a ventilation.

The third question raised was as to the taxes imposed on the lots of land partly owned by the Government under an expropriation for the enlargement of the canal, and without any regard to the expropriation. This question is decided against the contestant, the facts not being clearly made out.

On the contestation with the School Commissioners, the only question is that of the taxes on the land used for streets, and a ventilation is ordered on that head, the same as in the other collocation for the town. In the one case, therefore, the collocation is reduced by \$443, amount prescribed, and in the other by \$200,—amount admittedly paid ; and in both a ventilation is ordered as to the balance of the collocation.

In Review, the judgment was confirmed.

MACKAY, J. MacLaren contests a judgment of distribution by which the town of St. Henri and the School Commissioners have been awarded money for taxes on lands in St. Henri

There are two contestations upon separate collocations, one in favor of the School Commissioners, the other in favor of the town of St. Henri. MacLaren is not proprietor of the lands, but has a first mortgage on them. The taxes of 1876, 1877 and 1878, he says, are prescribed, and a great portion of the lands taxed are public streets, and not taxable. MacLaren has succeeded in the Court below.

We all think that the judgment complained of, freeing the street surfaces from taxation, cannot be disturbed, and, therefore, the *ventilation* ordered must go on.

Dispute is as to whether the prescription allowed by the Court below (of \$443) ought to be held improperly allowed, the parties collocated claiming that there has been interruption, by payments on account, and by virtue of an *arrangement* (December 1879). The payments on account are not proved; credit is given for them by the Secretary Treasurer of St. Henri; he writes down the payments in his book; but, as said by me in another case just disposed of, a plaintiff or creditor cannot make proof for himself, or make interruptions of prescription by merely writing them down in his books. Can the *arrangement* of December, 1879, affect MacLaren, seeing that he is not party to it, and that Wilson could not bind him? Let Wilson be bound as he arranged; but MacLaren is not bound, being a third person not party to the *arrangement*. It is error to say that MacLaren, not owner of the lands but only a mortgage creditor, is to be bound by all or any treaties that his debtors, the land-owners, may make. Yet the counsel for St. Henri insists that "it is evident that he is so bound." Art. 2229 of our Code is formal in favor of MacLaren.

Judgment confirmed.

Longpré & Co., for plaintiffs.
Trenholme & Taylor, for contestant.

COURT OF REVIEW.

MONTREAL, Feb. 28, 1883.

TORRANCE, J., DOHERTY, J., RAINVILLE, J.

CHARTRAND v. THE CORPORATION OF THE COUNTY OF ST. JOHN.

Registrar—Claim for furnishing, heating and cleaning office.

Where a county registrar, who had never applied to the County Council to make provision for heating and cleaning the registry office, brought suit for the cost of such service at the end of 17 years, held that there was no right to recover.

TORRANCE, J. The plaintiff, who is registrar of the County of St. John, claims from the county \$935. His declaration states that he has been such registrar for 17 years; that the registry office has always been kept in a building belonging to the defendant, that the defendant was bound to furnish, maintain, heat and clean the said office, but has failed to do so, and this duty has been performed by plaintiff for the defendant, and the value of plaintiff's performance of this duty was at least \$50 per annum, and further, plaintiff has paid for defendant the sum of \$60 for three desks, for the advantage of defendant, and \$25 for seven chairs useful and necessary for the furnishing of said office.

The defendant denies the liability, and succeeded in the Court below.

The plaintiff examined as a witness says that when he bought the furniture it did not enter into his head that he should later claim the amount from defendant, and he never addressed himself to the Council of the County to provide for the heating and the maintenance of the office.

C. S. L. C. cap. 24, s. 26, § 5, authorizes the Council to pass a by-law for the acquisition, construction and maintenance of an office for the registration of deeds and of a fire-proof vault; but I see no reason to say that the appeal is well founded. The judgment should be confirmed.

Judgment confirmed.

Lacoste, Globensky & Bisailon, for plaintiff.
Beique & McGoun, for defendant.

SUPERIOR COURT.

MONTREAL, JAN. 25, 1883.

Before RAINVILLE, J.

ERNEST ANDERS v. CHARLES HAGAR.

Mandamus—*Inspection of minute book.*

The shareholders and creditors of a joint stock company have a right to demand inspection of the minute book of the directors; when it appears by the evidence that said minute book may contain certain entries required to be kept in the company's books under 40 V., cap. 43, § 38.

This was a petition for mandamus, served upon the defendant as president of the Pioneer Beet Root Sugar Company. It appeared that the petitioner was a creditor and shareholder of the company, and as such made an application to defendant as president, to be shown the

company's books, under 40 Vic., cap. 43, § 37, Joint Stock Company Act of 1877.

The only book then under the control of the defendant was the minute book, the other books being at Coaticook, the company's place of business. The defendant claimed that he was not bound to show the minute book, it not being enumerated in § 36 of the Act, as one of the books required by law to be kept open for inspection.

Upon examination of the defendant, it appeared that he was not able to state positively that said minute book did not contain certain entries which by law the company was required to keep and exhibit under the Act.

Mandamus granted.

Laflamme, Huntington, Laflamme & Richard, for petitioner.

Wotherspoon, Lafleur & Heneker, for defendant.

SUPERIOR COURT.

MONTREAL, JUNE 15, 1882.

Before MACKAY, J.

LAFON V. LAFON et al.

Aliment—Misconduct of plaintiff.

MACKAY, J. The action is *in forma pauperis* by a poor man, sixty-four years of age and in bad health, against his three sons, and one daughter, and her husband, asking for alimentary pension. It seems that he would be satisfied with two dollars a week to be made up by the defendants together.

Of the defendants the three sons plead that they have always helped the plaintiff as far as possible, that they have always been willing a *tour de rôle* to receive the plaintiff in their homes; yet they offer \$1 a month each; they say they are poor, and really not worth \$5 a piece their debts paid.

The son-in-law and his wife do not plead. The picture of the parties is this: The plaintiff is made out to have been always what is vulgarly called a hard case. He used to maltreat his first wife and family, and was dreadfully addicted to intemperance. He has been known to thrust his young children into the street, kick his poor wife, blacken her eyes, attempt to strangle her, etc. A witness adds that when she was relieved, by death, he had not a copper to bury her. It is the sad tale so often told of drink's doings. It is not said whether or not he frequented drinking saloons, regularly

licensed. It is proved that at present he is unable to work.

It is to be remarked that, however little meritorious in one view plaintiff's case may be, his action may not be bad; he may have right to aliment from defendants.

Now for the defendants, they appear hard working, respectable, struggling people, not rich, but the very contrary. One has a wife and two children, another a wife and four children, another is a widower with two children; since he was eight years of age his father, the plaintiff, never did a thing for him, he swears. Yet plaintiff may have right to *aliments* from him.

The son-in-law, one of the defendants, says that he does not earn a dollar a day regularly, and has a wife and two children; he does not plead, and offers, by his deposition, fifty cents a week to plaintiff. He seems fair.

The judgment of the Court is that L. Beaudry and wife together, do pay fifty cents a week to plaintiff, and the other three defendants each forty cents a week; and arrears are allowed, at these rates, and ordered to be paid from say 1st of February last; the money to be *portable* and payable on the Monday of each week for the future; the arrears payable in fifteen days from date of the present judgment.

On Monday next, one week's pension for the current week to be payable; no costs are allowed.

Adam & Co., for the plaintiff.

Archambault & Co., for defendants.

SUPERIOR COURT.

[In Chambers.]

MONTREAL, February 21, 1883.

Before JETTÉ, J.

IVES V. SEEGMILLER et al., and E. CONTRA.

Proportion of costs taxable against plaintiff on discontinuance of proceedings against one of three defendants, who has severed in his defence from the other two defendants who plead jointly.

The plaintiff's action was directed against three defendants, Seegmiller, Carter and Smith, as having been co-partners under the firm name of Seegmiller, Carter & Co. Seegmiller severed from the other two in his defence, pleading, amongst other things, that before the institution of the action he had ceased to be a member of the firm, and that plaintiff had released him from all liability connected therewith, and had there-

after dealt with the remaining partners who continued the business under the style of Carter, Smith & Co. The defendants Carter and Smith appeared and pleaded jointly to the action.

On 5th December, 1882, towards the close of the Enquête, the plaintiff filed a discontinuance of his proceedings against Seegmiller with costs.

Defendant's counsel thereupon applied to the Prothonotary for taxation of their bill against plaintiff on this discontinuance, claiming that not only the fees on that issue, but all the costs of *enquête* should be included in this taxation. The Prothonotary ruled that only one-third of the costs which had been incurred in the interest of all the defendants should be taxed against the plaintiff on his discontinuance.

On revision, before Mr. Justice Jetté, it was held that *one-half* instead of a third of these common expenses should be taxed against plaintiff, his Honor adopting the doctrine that as between co-defendants, costs are divisible according to their interest, and not *par portion viriles*. (Berriat-Saint-Prix, Procédure, p. 172, and authorities there cited). In the present case there being two issues, the defendant Seegmiller was liable to his co-defendants for one half of the expenses incurred in the common interest, and the plaintiff on discontinuing, was bound to hold him harmless against his co-defendants to that extent.

Wothersop on, Lafleur & Heneker for plaintiff.

R. A. Ramsay, counsel.

Abbott, Tail & Abbotts for defendants.

COUR DE CIRCUIT.

MONTRÉAL, 15 Janvier 1883.

Coram LORANGER, J.

LA COMPAGNIE D'ASSURANCE MUTUELLE CONTRE LE FEU DU COMTÉ DE JOLLETTE, v. DAME M. L. PROTEAU et vir. (1)

Compagnie d'Assurance Mutuelle—Billet de prime—Preuve—Responsabilité des assurés.

Jugé :—Que dans les poursuites intentées par une Compagnie d'Assurance Mutuelle pour répartir des pertes par elle subies, sur les billets de prime des assurés, elle est tenue de prouver que la répartition a été faite par nécessité, pour réparer des pertes actuellement encourues par la Compagnie depuis la signature du billet de prime, et que la répartition a été faite proportionnellement au dit billet. Que le défendeur sera admis à prouver que la répartition a été faite sans nécessité et est frauduleuse.

(1) Le rapport de cette cause a été soumis à l'honorable juge Loranger qui l'a approuvé.

La demanderesse, dans son action, allègue que sur l'application de la défenderesse, elle a effectué avec elle un contrat d'assurance mutuelle, et qu'en conséquence la défenderesse lui a fait un billet de prime pour \$41; qu'ainsi elle est devenu un des membres de la dite Compagnie et sujette à ses règlements et aux lois en sa faveur.

Qu'à une assemblée de la dite Compagnie, il fut décidé de liquider la société et qu'un bureau de directeurs fut nommé, lesquels annulèrent toutes les polices, le 28 février 1881, et firent une répartition totale sur tous les billets de prime pour payer les dettes de la Compagnie et le coût de la liquidation.

C'est pour cette répartition que la défenderesse était poursuivie.

Le plaidoyer à l'action fut que la Compagnie n'avait aucun intérêt parce qu'elle avait transporté le montant de ses billets de prime, y compris celui de la défenderesse à une tierce personne, dans un but de spéculation; que la Compagnie n'alléguait pas qu'elle avait fait des pertes suffisantes pour réclamer le total des dits billets, et que de fait la dite répartition avait été faite sans autorité, ni nécessité quelconque. Que la défenderesse ne pouvait être responsable que pour sa quote-part des pertes depuis son contrat d'assurance.

A l'enquête, la demanderesse prouva qu'à une assemblée générale des membres de la Compagnie, tenue les 10 janvier et 9 février 1881, il avait été décidé de dissoudre la Compagnie, et de liquider ses affaires; que les polices avaient été annulées le 28 février suivant, et qu'avis à cet effet avait été donné à ses membres; que deux prélèvements avaient été faits les 5 avril et 9 Décembre 1881, ce dernier pour toute la balance des billets de dépôt, et étant celui en vertu duquel l'action en cette cause avait été intentée. La défenderesse prouva que la balance des billets de dépôt, savoir, \$29,000, avait été transportée à un nommé Ayer, de Magog, pour \$3,500, et que l'argent réclamé par l'action, devait en conséquence retourner à un tiers.

A l'argument, la défenderesse appuya sur le fait que la Compagnie n'avait pas établi sa réclamation d'une manière satisfaisante, et que pour justifier ses prélèvements, elle était obligée de donner des détails sur les pertes qu'elle avait subies et sur les frais d'administration de son bureau d'affaires.

PER CURIAM :—“ La Cour, etc.

“ Considérant que la demanderesse, Compagnie d'Assurance Mutuelle incorporée en vertu des dispositions du ch. 68 des S. R. B. C., réclame de la défenderesse, membre de la Compagnie, la somme de \$30.13, montant de sa proportion dans le prélèvement fait sur les billets de dépôt, en vertu d'une résolution du bureau de direction du 9 décembre 1881 ;

“ Considérant que la défenderesse a plaidé : que le prélèvement réclamé a été fait sans nécessité ; et qu'il n'existait à l'époque de la dite résolution du 9 décembre 1881, et qu'il n'existe encore, aucune créance contre la Compagnie demanderesse ; que la présente action a été intentée par et dans l'intérêt de certains spéculateurs, qui auraient acheté à vil prix les billets de dépôt des membres de la dite Compagnie, et dans le seul but d'encourager la spéculation de ces dites personnes ;

“ Considérant que la responsabilité de la défenderesse, comme membre de la dite société est déterminée, et limitée aux pertes encourues pendant la durée de sa police d'assurance, et ce dans la proportion définie par son billet de dépôt ;

“ Considérant que dans l'espèce, il n'existe aucune preuve que la demanderesse fut à l'époque du dit prélèvement, dans la nécessité de faire ce prélèvement ; qu'au contraire, il est en preuve que le produit de la vente des dits billets de dépôt a été distribué entre les créanciers de la dite demanderesse ; que rien ne fait voir que depuis ce paiement aucune demande ou réclamation ait été produite de la part d'aucun créancier de cette dernière ;

“ Considérant que la demanderesse n'a fait aucune preuve satisfaisante de l'item \$19,204 de l'exhibit A, savoir, l'état des affaires de la dite société à l'époque du dit prélèvement ; que déduction faite de ce montant, il se trouverait que le prélèvement du 5 avril précédent était plus que suffisant pour payer et acquitter toutes les dettes de la Compagnie demanderesse ;

“ Considérant qu'il n'est pas prouvé qu'à l'époque de l'institution de l'action en cette cause, il existait contre la demanderesse d'autres réclamations que celles qui avaient été couvertes par le prélèvement du 5 avril 1881 ;

“ Considérant que l'action de la dite demanderesse est mal fondée, la Cour déboute la dite action avec dépens distraits à MM. Barnard,

Beauchamp & Doucet, avocats de la défenderesse.

Greenhields, Busted & Guerin, pour la demanderesse.

Barnard, Beauchamp & Doucet, pour la défenderesse.

(J. J. B.)

RECENT ONTARIO DECISIONS.

Criminal Law—Selection of Jurors—32-33 Vict. cap. 29, Sec. 44 (Can.)—By 32-33 Vict. c. 29, s. 44 (Can.), every person qualified and summoned to serve as a juror in criminal cases according to the law in any province, is declared to be qualified to serve in such province, whether such laws were passed before the B. N. A. Act or after it, subject to and in so far as such laws are not inconsistent with any Act of the Parliament of Canada. By 42 Vict. cap. 14 (O.) and 44 Vict. cap. 6 (O.) the mode of selecting jurors in all cases formerly regulated by 26 Vict. c. 44, was changed. The jury was selected according to the Ontario Statutes, and the prisoner challenged the array, to which the Crown demurred, and judgment was given for the Crown. The prisoner was found guilty and sentenced, and he then brought error. *Held* (per Hagarty, C.J., that the Dominion Statute was not *ultra vires* by reason of its adopting and applying the laws of Ontario as to jurors to criminal procedure. (Queen's Bench Division, Dec. 9, 1882.)—*Reg. v. O'Rourke*.

RECENT DECISIONS, P.Q.

Contrainte par corps.—La contrainte par corps en matière de dommages-intérêts résultant d'injures personnelles, peut être obtenue postérieurement au jugement accordant tels dommages, bien qu'elle n'ait pas été demandée par les conclusions de la déclaration.—*Ouellette v. Vallières*, (C.C.) 26 L. C. J. 391.

2. En pareil cas, la contrainte peut être accordée pour moins de 200 livres ancien cours ; elle peut l'être pour tous dommages adjugés quel qu'en soit le montant, et dans le cas actuel, elle sera accordée pour la somme de \$25.—*Id.*

Insurance (Life).—Although a policy of life insurance issued by a Company having its head office in New York, but licensed to do business in Canada, and issued and payable in New York, on the life of a person resident in Montreal, and

on an application made through the Company's agent in Montreal, is a Canadian policy within the meaning of the Dominion Statute 40 Vict. ch. 42; the contract is, nevertheless, a New York one, and payment of the amount covered by the policy must be demanded there before the Company can be considered in default. Nevertheless, in case of the insolvency of the company the assured would have a right to rank with Canadian policyholders on the special deposit made under said Statute.—*The Equitable Life Assurance Co. of the United States & Perrault et al.*, (Q.B.) 26 L.C.J. 382.

2. Although the assured died in Montreal, payment under judgment of the Superior Court of New York to the administrator of the assured's estate in New York was a complete bar to any suit for the recovery of the amount of the policy in Montreal.—*Id.*

ASSUMED NAME OF AUTHOR NOT A TRADE MARK.

For the first time we find "Mark Twain" engaged in serious business, namely, a lawsuit. He sued Belford, Clark & Co., of Chicago, to restrain them from publishing a book written by another person under the assumed name of "Mark Twain." The decision made by Judge Blodgett, in the United States Circuit Court, for the Northern District of Illinois, is given in the *Chicago Legal News*, of January 20th, and sustains a demurrer to the bill. The court, after showing that no question of infringement of copyright arises under the pleadings, remarks: "The position assumed by the complainant in this bill is, that he has the exclusive right to the use of the *nom de plume*, or trade-mark of 'Mark Twain,' assumed by him, and that defendants can be enjoined by a court of equity from using such name without the complainant's consent or license. It does not seem to me that an author or writer has or can acquire any better or higher right in a *nom de plume*, or assumed name, than he has in his Christian or baptismal name. When a person enters the field of authorship he can secure to himself the exclusive right to his writings by a copyright, under the laws of the United States. If he publishes anything of which he is the author or compiler, either under his own proper name or an assumed name, without protecting it by copyright, it becomes public property, and any person who

chooses to do so has the right to republish it, and to state the name of the author in such form in the book, either upon the title page or otherwise, as to show who was the writer or author thereof. * * * The bill rests then upon the single proposition that the complainant is entitled to invoke the aid of this court to prevent the defendants from using the complainant's assumed name of 'Mark Twain' in connection with the publication of sketches and writings which complainant has heretofore published under that name, and which have not been copyrighted by him. That he could not have done this if these sketches had been published under complainant's proper name is clear from the authorities I have cited, but the complainant seems to assume that he has acquired a right to the protection of his writings under his assumed name as a trade name or trade-mark. This is the first attempt which has ever come under my notice, to protect a writer's exclusive right to literary property under the law applicable to trade-marks. Literary property is the right which the author or publisher of a literary work has to prevent its multiplication by copies or duplication, and is from its very nature an incorporeal right. William Cobbett could have no greater right to protect a literary production, which he gave to the world under the fictitious name of 'Peter Porcupine,' than that which was published under his own proper name. The invention of a *nom de plume* gives the writer no increase of rights over another who uses his own name. Trade-marks are the means by which the manufacturers of vendible merchandise designate or state to the public the quality of such goods, and the fact that they are the manufacturers of them. And one person may have several trade-marks designating different kinds of goods or different qualities of the same kind; but an author cannot, by the adoption of a *nom de plume* be allowed to defeat the well-settled rule of the common law in force in this country, that the 'publication of a literary work without copyright is a dedication to the public, after which any one may republish it.' No pseudonym, however ingenious, novel or quaint, can give an author any more rights than he would have under his own name. The policy of the law in this country has been settled too long to be now considered doubtful; that the

publication of literary matter without protection by copyright, has dedicated such matter to the public, and the public are entitled to use it in such form as they may thereafter choose, and to quote, compile or publish it as the writings of its author. That is, any person who chooses to do so can republish any uncopyrighted literary production, and give the name of the author either upon the title page or otherwise, as best suits the interest or taste of the person so republishing.—*Albany Law Journal*.

GENERAL NOTES.

Judah P. Benjamin, Q.C., has retired from practice at the English bar. The cause is said to be declining health. Mr. Benjamin has enjoyed a large and successful practice, almost since his admission to the English bar in 1866, and he is believed to have realized a considerable fortune.

A new terror is added to the anxieties of law examiners. Herr Keysner, a Supreme Court councillor at Berlin, lately received a package which, on examination, was found to contain an infernal machine. This, it is stated, was sent to him by a law student irritated at the severity of his examination.

In reply to a question in the House of Commons (Feb. 16), Sir John A. Macdonald stated that the work of consolidating the Statutes affecting Criminal law is not sufficiently advanced to enable it to be submitted for the consideration of Parliament during the present session. A report of progress has been made.

No one, we imagine, ever supposed that the old Courts at Westminster possessed "artistic merit." Nevertheless, among the things recently offered for sale there were materials of great beauty. It would be difficult to find wainscoting of a more solid and unblemished character than that of the Court of Exchequer, and it is to be hoped that it has fallen into good hands. The relic hunter was, however, placed at a considerable disadvantage. He could not buy a set of bookshelves without also investing in a jury-box, witness box and other pieces of furniture such as are not in request every day in private houses. It is almost melancholy to think of the possible destination of some of these classic planks.—*Law Times*.

The Longmans have just issued a thick volume containing passages from a manuscript of Lord Bacon, with parallel passages from Shakespeare's plays. The Bacon manuscript is in the Harleian collection. It was apparently drawn up as a sort of commonplace book for use in the great Chancellor's writings, but none of the quotations or phrases are to be found in his acknowledged works, while all are in Shakespeare. On the whole, this book is the most remarkable attempt yet made to prove that "Baconian theory" of Shakespeare with which both American and English readers have been acquainted through the books of Miss Delia Bacon, Mr. Nathaniel Holmes, and Mr. George Wilkes. The title of the manuscript is—"Progress of Formularies and Elegancies."

Portuguese deputies have to swear on the Holy Gospels to be faithful to the King and to maintain the Catholic Apostolic and Roman religion. A republican deputy during the present session has introduced a bill to abolish the religious oath. He would replace the Holy Gospels by an urn filled with the electoral returns, and proposes that every deputy shall stretch his hand over the urn, which would represent the national sovereignty, and promise on his honor to devote all his powers to the preparation of just and wise laws, which would tend to establish on solid bases the rights of the citizen and the greatness and glory of the country.

The Jeffersonville correspondence of the *Courier-Journal* says: "Gilligan, Clegg & Anthony are arranging to bring suit against the Jeffersonville Railway for \$10,000 for a peculiar damage they claim resulted to their plaintiffs. John Wyatt and a Louisville detective went to the house of two ex-Kentuckians, at a point near Henryville, Clark County, one night, more than a year ago. They put the men under arrest for an alleged crime committed in Kentucky, and took them to the railroad station at Henryville. Captain Clegg, who was attorney for the accused party, notified the conductor, Will Conner, that the officers were kidnapping the men and had no warrant to arrest them. The conductor said he didn't care, if they had tickets he must take them. The attorneys think they gave the Company proper notice as a common carrier not to assist the officers in kidnapping, and they want to see if there is any liability in such a case. The men were afterward acquitted by a Kentucky Court."

Amusing "definitions" are cropping out on every hand. In *Moir's Estate*, Eng. Ch. Div., Nov. 3, 1882, the testator directed that "all the household goods, furniture, pictures, prints, books, china, articles of vertu, and all my plate, jewels, and all other things in and about the said mansion house," should be "annexed to the same as heirlooms to be enjoyed by the person or persons for the time being beneficially entitled to the said mansion house under the limitations hereinbefore contained." He died possessed, *inter alia*, of a cellar of wines, and two carriage horses and three carriages and harness. Kay, J., held that the property in question, being consumable, did not pass as "heirlooms."—In the *Matter of Hastings*, Philadelphia Quarter Sessions, Nov. 27, 1882, (*Leg. Int.*, Dec. 1, 1882), it was held that a "garden," where spirituous drinks were sold, and there was singing, dancing and boxing on the stage, "by the best artists," although no entrance fee was charged, and there was no drop-curtain, scenery, or footlights, was a "place of amusement," within the act exacting licenses for "any theatre, circus, museum or other place of amusement." The Court observed: "Why it should be called a garden at all does not appear, since it contains neither trees, flowers, plants, grass nor botanical specimens of any kind, nor in fact anything whatsoever suggestive of horticulture. It must be therefore by some figure of speech that it is called a garden, just as one speaks of any place of great enjoyment as a paradise. Perhaps this is a paradise to those accustomed to resort there."—*Albany Law Journal*.

The Legal News.

VOL. VI. MARCH 24, 1883. No. 12.

THE SUPREME COURT AND ITS CHAMPION.

The *Law Journal*, of Toronto, has essayed a defence of the unusual expressions applied by the Supreme Court to the judgment of our Provincial Court of Appeal in *Grant v. Beaudry*, and which were noticed in a previous issue by our correspondent "R." (p. 41). It is obvious, however, that discussion of a question is idle when a controvertist is either totally ignorant of the facts, or wilfully misrepresents them. The champion of the Supreme Court evidently knows nothing about the case of *Grant v. Beaudry*, for he states that the Court of Queen's Bench gave "an opinion on a subject which was not before the Court as a Court of Appeal, and had not even been discussed in the Court below, and of the existence of which the Queen's Bench had no judicial notice,"—which our readers know to be utterly unfounded. The champion does not appear to have read even the communication to which he professes to reply; for he says: "We perfectly agree with 'R.' that the judgment of the Supreme Court will hurt neither the reputation of that Court nor that of Mr. Justice Gwynne, one of its brightest ornaments." But what *R.* said was that the decision of the Supreme Court in *Grant v. Beaudry* will not hurt the reputation of the Court of Queen's Bench.

Apart from the obvious fact that the champion is disqualified by ignorance from expressing any opinion on the question, there is no attempt to assail the position taken by "R.," a position which is supported by formal citations of the law. We may, therefore, dismiss without further remark the impotent effort of the champion who, *rabido ore*, has rushed to the defence of the Supreme Court.

But it occurred to us while reading the communication of "R." that something might have been said, which was not said by our correspondent. "R." restricted himself to the pure question of law, as to the discretion of a Court to pronounce upon a point not absolutely necessary to the decision of the cause. But if he had chosen to pursue the subject a little further, what would have been the result? How does

the Supreme Court itself stand as to "extra-judicial" opinions? We call its champion as our witness. In March, 1880, referring to the judgments of this Court, the *Law Journal* says:

"The main difficulty that meets one in considering some of the judgments of the Supreme Court is upon what grounds does the judgment of the Court rest—what is and what is not extra-judicial in each particular judgment—and in the united result which forms the decision of the Court? Consider for instance *McLean v. Bradley*, 2 S.C.R. 535. . . . The judgment as reported emphasizes the want of harmony in the Court, and by consequence weakens the authority of its decisions and sows the seeds of future litigation by the diversity of opinions expressed on points which are left undetermined by the Court, though peremptorily and often diversely passed upon by individual judges."

In *Grant v. Beaudry* the Court of Queen's Bench, at the instance of both parties, pronounced an opinion upon the sole question submitted on the merits, and which had been the subject of a long and expensive trial, for the purpose of sparing the parties the cost and inconvenience of further litigation, but it appears that the Supreme Court, if we may believe its champion, sows the seeds of future litigation by its extra-judicial utterances!

So far we have heard the champion as a witness. Now let us respectfully ask some of the learned Judges of the Court to step into the box. Turning to volume 3 of the Supreme Court Reports, we find at page 576 that a majority of three of the judges of the Court (including Mr. Justice Gwynne), in the well known case of *Lenoir v. Ritchie*, expressed an opinion on the right of the Provincial Legislatures to deal with the appointment of Queen's Counsel. The opinion is summarized in the head note to the case, page 576, par. 3, but immediately after we find under No. 4, *per Strong and Fournier, JJ.*, the following: "That as this Court ought never, except in cases when such adjudication is indispensable to the decision of a cause, to pronounce upon the constitutional power of the Legislature to pass a statute, there was no necessity in this case for them to express an opinion upon the validity of the Acts in question." And this *précis* is fully borne out by the re-

marks of the learned Judges reported in the text. So we find not only their champion condemning the Judges of this tribunal "for the diversity of opinions expressed on points which are left undetermined by the Court," but two of the learned members of the Court expressed themselves in the same sense on a celebrated occasion; and it may be added that it has been a controverted point among lawyers of the several provinces ever since, whether the opinion expressed by the majority of the Supreme Court on that occasion is of any binding authority.

We apologize to our readers for taking up space which might be devoted to more useful purposes, but we think we have shown that the Supreme Court in expressing, through Mr. Justice Gwynne, the opinion referred to, was really in a remarkable manner, (if its recent opinion be correct) pronouncing its own condemnation. It is not necessary to go further. We see that the champion above referred to charges "R" with disrespect. We leave our contributors, within reasonable limits, to be judges of their own style, and "R" does not need any defence on that head, but it might be added that the quotations from the *Law Journal*, (not, be it remembered, from remarks of correspondents, but from editorial articles) show that the champion can hardly be taken as a model of suavity. Other even more contemptuous expressions abound. For example, referring (in April, 1879) to the proposed abolition of the Supreme Court, the champion said:

"The profession, as a whole, have not that confidence in it which should appertain to a court of final resort; for example, there is hardly a lawyer, in this Province at least, who would not, on a question of Ontario law, prefer the opinion of our Court of Appeal, or even of one of our Superior Courts. . . . It is also manifest, that the Court, so far, has been a disappointment."

And in March, 1880, it discourses in this respectful strain:—

"There are some who think the best way to improve the Supreme Court would be to improve it off of (*sic*) the face of the earth. We trust some less heroic remedy may be found, though the Court certainly has, both collectively and through some of its members, on several occasions and in various unnecessary ways, endeavoured to commit suicide."

NOTES OF CASES.

COURT OF REVIEW.

ONTARIO, March 10, 1883.

TORRANCE, J., DOHERTY, J., & RAINVILLE, J.

MCCRACKEN *et al.* v. LOGUE.

Jurisdiction—Appointment of Sequestrator.

A judgment in Chambers appointing a sequestrator is in the nature of a final judgment, and a review may be had upon such judgment.

A sequestrator should not be appointed when one of the parties has title and is in possession; and accordingly, where the defendant was in possession of certain lots under location tickets, and an action was brought to have it declared that the letters patent had been obtained by fraud, &c., an application by the plaintiff for the appointment of a sequestrator, pending the suit, should be refused.

This was an appeal from a judgment of Mr. Justice Macdougall, of the Ottawa District, of date 11th January, ordering the appointment of a sequestrator.

The complaint of the plaintiffs set forth that, in 1876, a license to cut timber on certain lots in the township of Egan was granted to one Henry Atkinson to the exclusion of all others; that on the 10th of October, 1878, Atkinson transferred his rights under said license to plaintiffs; that defendant, in order to deprive plaintiffs of a portion of their rights, obtained the issue of location tickets in favour of Hector Charbonneau, Joseph Laverdure and Joseph Beauregard, for lots 34, 35 and 36 in the 1st and 2nd ranges of Eagle River, in said township; that said persons had no intention permanently to occupy said lots or to obtain letters patent for the same in their favour; that in April and May, 1879, they transferred their rights to defendant, who obtained in his favour letters patent from the Crown on the 17th January, 1882; that the Crown agent refused to renew the licenses as to said lots in favour of plaintiffs; that in the autumn of 1882, defendant cut a quantity of pine logs on said lots, of the value of \$2,200; that defendant had obtained the issue of said letters patent by fraud and misrepresentation, as well as the issue of the location tickets to the said Hector Charbonneau and others, and obtaining from them said transfers; that there were upon said lots quantities of pine of the value of \$6,200. Plaintiffs

prayed that they might be declared to have been the right owners of the rights and interest granted under the license to Henry Atkinson in, to and upon said lots 34, 35 and 36, and to have been so on the 17th of January, 1882; that the letters patent issued on said last mentioned date under the great seal of the province to defendant, granting to him said lots, be declared to have been obtained by fraud and imposition on the part of defendant; that plaintiffs be declared to be the owners and proprietors of the timber on said several lots; that a writ of attachment issue, &c., to attach said timber; that defendant be ordered to deliver up to plaintiffs said timber, and in default to pay \$5,200, &c.

By a petition presented to the judge in chambers on the 11th January, plaintiffs alleged the foregoing facts, and further that defendant had been guilty of fraud and imposition in obtaining the issue of the location tickets in the name of the above three persons, who were mere *prête-noms* for himself, and who were at the time in defendant's employ, one as a bar-tender and the others in positions equally incompatible with that of a *bona fide* settler. That these parties named were used merely to cloak the designs of defendant and to deceive the officers of the Crown; that the lots in question were only fit for lumbering purposes and not for cultivation; that defendant was busily engaged cutting the pine timber on said lots, had constructed shanties thereon, and had men engaged carrying on lumbering operations, and had contracted with one James Maclaren to supply large quantities of pine logs to be taken from these lots. The petition prayed that a sequestrator be appointed to the lots during the suit. The petition was granted. Hence the appeal.

TORRANCE, J. The want of jurisdiction to entertain this appeal has been objected, and in support of the jurisdiction, the case of *The Heritable Securities Association v. Racine*, 2 Legal News, 325, has been cited. In that case we understand the Court of Review upheld the jurisdiction on the ground that the naming of a sequestrator was in the nature of a final judgment, and we concluded to follow that decision.

Next, as to the nomination, by C. C. 1824 the Court may, according to circumstances, appoint a sequestrator, and by C. C. P. 876 the Court or judge may make the appointment. By C. C.

P. 1038, the suit to annul the letters patent could be brought by any interested party, but this was repealed by 32 Vic., c. 11, s. 33, and the suit must now be in the name of the Crown. (Vide *Pacaud & Rickaby*, 1 Q. L. R. 245: and *Angers & Murray*, 25 L. C. Jur. 208.) The defendant now objects that, having title and being in possession, the sequestrator should not be appointed. Pigeau, 2nd vol., 345, says: "Le séquestre ne peut être ordonné lorsque l'une des parties a titre et lorsqu'elle est en possession." Laurent, vol. 27, Nos. 173 and 178, approves of this doctrine.

The defendant further objects that the titles invoked by plaintiffs, namely, the licenses to cut timber, do not give them any title to the lands over which the sequestrator is appointed. These titles give them at best the right to cut timber on the lands. But the judgment orders the defendant to give the sequestrator free possession of the land and premises in question. Seeing the title of the defendant, and that it is not now attacked by the Crown, and may never be, seeing all the circumstances of the case, we think that the petition for the sequestration should have been rejected, and we accordingly annul the order of the 11th January, and dismiss the petition of plaintiffs.

Judgment reversed.

T. P. Foran, for plaintiff.

R. Laflamme, Q.C., counsel.

L. N. Champagne, for defendant.

J. R. Fleming, counsel.

SUPERIOR COURT.

MONTREAL, March 10, 1883.

Before TORRANCE, J.

RUSSELL et al. v. MAXWELL et al.

Contract—Rescission for failure to comply with terms.

The plaintiffs in Montreal were bound by a contract to pay for the goods supplied by defendants in Scotland upon receipt of invoice and bill of lading. They failed to pay for one lot until 15 days after receipt of bill of lading. Held, that the defendants were justified in cancelling the contract.

This was an action of damages for breach of contract, brought by a Montreal firm against a Scotch firm.

There was no question as to the formation of the contract and its partial fulfilment, or as to its having been cancelled by the Scotch firm.

The important question was whether the Scotch firm was justified in the cancellation.

The agreement was contained in a letter of date 9th July, 1881, written by A. C. Leslie & Co., defendants' agents, setting forth that the goods supplied by defendants to plaintiffs should be paid for by the plaintiffs by their cheque upon the receipt by the plaintiffs of the shipping documents (to wit, invoice and bill of lading). The defendants complained that on or about the 26th August, 1881, they shipped from Glasgow to plaintiffs two lots of iron of the value of £368 8s. 1d stg., and forwarded to plaintiffs through defendants' agents in Montreal, viz., A. C. Leslie & Co., the documents relating to said shipments, which documents Leslie & Co. presented to plaintiffs, and demanded from plaintiffs their cheque in payment of the amount due by them under the contract; the plaintiffs failed to pay for the iron as covenanted, and Leslie & Co., on the 16th September, 1881, wrote defendants to that effect, and defendants on or about the 26th September, received the letter from Leslie & Co., and immediately, by cable and letter, cancelled the balance of the order.

PER CURIAM. The mode in which the plaintiffs made settlements is explained by Alexander C. Leslie and his bookkeeper, William G. McMillan. Leslie says that the first invoice came on the 5th September, and was paid on the 9th. The second and larger shipment arrived on the 8th September, and was paid for on the 23rd September. This was the shipment that caused the whole difficulty. Plaintiffs did not pay till 15 days after the bill of lading had been received. They missed one Allan and one or two Cunard mails. Leslie handed to plaintiffs the documents without receiving the cash, and says that if he had rigidly carried out his instructions he would not have done so. He would not have handed over the documents without receiving from the plaintiffs the cash for them.

The intentions of the defendants were very plain from their letter of 29th September. Witness says they wrote: "Of course you have not parted with the documents." McMillan says that defendants, by their letter of 28th September, cancelled the balance of the contract not then shipped, and that letter on receipt here was read to plaintiffs.

The Court holds that defendants were fully justified in the cancellation of the contract.

Authority is not necessary to support this conclusion, but *Withers v. Reynolds*, 2 Barn. & Adolphus, 882, appears to be in point.

Action dismissed.

Abbott, Tait & Abbotts for plaintiffs.

Archibald & McCormick for defendants.

SUPERIOR COURT.

MONTREAL, March 10, 1883.

Before TORRANCE, J.

GEDDES v. O'REILLY et vir.

Married woman an—Authorization to contract.

A married woman separated as to property cannot bind herself without the authorization of her husband, to pay a real estate agent a commission on the sale of land for her.

The plaintiff was a real estate agent, and claimed from Mrs. Wilson, a married woman separated as to property from her husband, his commission at 2½ per cent. on the sale of land for her. She had signed an authorization to Mr. Geddes without the participation of her husband. It was not proved that he knew of the authorization, but by her marriage contract she had separate administration of her property.

M. M. Tait, Q.C., for the plaintiff, submitted, 1st. That the female defendant had a right to engage the plaintiff to sell her property, and to agree to pay him a commission thereon in the event of such sale, and that Mr. Wilson, her husband, by his acts and deeds sufficiently authorized the female defendant to make such an agreement, and by his acts and deeds ratified and confirmed the same. 3rd. In view of the clauses and conditions of the marriage contract, Mrs. Wilson had a right to engage Mr. Geddes to sell her property and to agree to pay him a commission therefor in the event of sale, as an act of administration, without the special authorization of her husband, seeing she was separated as to property and had the entire administration of her own property under her marriage contract.

Weir, e contra, cited C.C. 177, and *Benjamin et al. v. Clark et vir*, 3 L. C. J. 121.

The Court held that the plaintiff had no case, not having proved authority from the husband.

Action dismissed.

Abbott, Tait & Abbotts for plaintiff.

Quinn & Weir for defendants.

SUPERIOR COURT.

MONTREAL, March 10, 1883.

Before TORRANCE, J.

LULHAM et vir v. THE CITY OF MONTREAL; and
THE CITY OF MONTREAL v. THE RECTOR AND
CHURCH WARDENS OF CHRIST CHURCH, defend-
ants en gar.

Damages—Slippery pavement—Evidence.

Where it was proved that the sidewalk was usually kept in excellent condition, and that the influence of the weather at the time of the accident was specially unfavorable, the action of a person who slipped and sustained injury was dismissed.

This was an action of damages against the City of Montreal for negligence in the care of the pavement of Union Avenue, in consequence of which the female plaintiff, on the 11th January, 1882, fell and broke her hip-bone, and had been permanently crippled.

PER CURIAM. The evidence is contradictory as to the condition of the pavement where the lady fell. Mr. Cordingley, her son-in-law, is positive that no ashes were there that day; had fallen twice himself. On the other hand, the guardians of the church property depose as to their practice to sprinkle ashes. Raphael Lajeunesse, employed at the Medical Hall opposite, deposes as to the care taken by the church officers to sprinkle ashes. John Fenner, driver for Mr. Robertson, Phillips square, says he always noticed the sidewalks of the Cathedral in good order—wet sand and ashes continually put there; passed there a dozen times a day; always in good state, in January every day. Mr. Shelton speaks positively as to the care taken of the sidewalk, and as to its being in a good condition, multitudes passing into and out of the church. He was there every day.

It is important here to inquire what the state of the weather was during this week. Mr. Thomas Davis King kept a record. There was rain on the Sunday previous—namely, on the 8th. Then there was rain and thaw on Monday, followed by frost on Tuesday. On the 11th January, the day in question, there fell eight inches of snow, and there was a strong wind blowing—15 miles per hour. There were here at work climatic influences to affect the condition of the pavements. Against these it was hard to provide. We have no evidence what kind of boots the lady had on when she fell,

and whether they were slippery or otherwise. I cannot say here that the negligence of the Corporation is proved, and I dismiss the action. —Vide 72 Maine R., *Smythe v. Bangor*, March, 1881.

Action dismissed.

Archibald & McCormick, for plaintiffs.

Roy, Q.C., and *Ethier*, for defendant.

Kerr, Carter & McGibbon, Q.C., for Christ Church.

SUPERIOR COURT.

MONTREAL, March 10, 1883.

Before TORRANCE, J.

ALLISON v. MACDOUGALL.

Gambling contract—Speculation on margin.

A customer deposited money with a broker to be used as "margin" in buying stock for speculative purposes. No delivery of the stock so purchased was intended, the broker's instructions being to realize as soon as a small profit could be made. In consequence of a decline in value, and the margin being thereby exhausted, the broker at one time sold stock at a loss. Held, that no action would lie against the broker under such circumstances, the contract being a gaming contract.

This was an action against a stock broker in Montreal for unduly selling stock in the Montreal Telegraph Company.

The plaintiff complained that he had, about the 12th October, 1881, instructed defendant by letter to purchase for him ten shares of Telegraph stock at and for the price of 127 per cent., and 20 shares of said stock for the price of 128 per cent., and defendant promised to make such purchase, and plaintiff at his request remitted him the sum of \$363.29 to enable defendant to make such purchase, and plaintiff instructed defendant to hold the shares subject to plaintiff's order, and to sell when the price should reach 133 per cent.; that at divers times after receiving said sum defendant purchased for plaintiff certain shares of said Telegraph Company and applied said sum in part payment, and did hold said shares subject to plaintiff's orders, but subsequently sold the same without notice to plaintiff; that defendant was guilty of a breach of contract with plaintiff, for which plaintiff reserved his recourse in damages, and further plaintiff had suffered damage to the amount of \$363.29; that

defendant had paid him \$27.14, leaving a balance of \$336.15, which he claimed.

The defendant pleaded that plaintiff never paid and never intended to pay for the said stock, or take delivery thereof, and no delivery was ever made, but the same was bought merely for speculative purposes on borrowed money, with a view to a re-sale as soon as a small profit could be realized, and the money to carry said stock was borrowed by defendant at his own risk, subject to the payment of interest and to his obligation to furnish and keep good to the lender a sufficient margin, to wit, 10 per cent. and upwards, as security for said loan, and plaintiff was bound to supply additional money to keep good the margin and protect defendant against loss on loans on said stock, which was liable to sudden fluctuations in price; that some time before the sale of said stock, plaintiff left his residence at Napanee and did not leave his address with defendant, or appoint any one to represent him. That, shortly after the departure of plaintiff, the stock began to decline until the margin had almost disappeared, and defendant was threatened with serious loss by continuing to carry the stock, and he sold the stock.

PER CURIAM. Our code, Art. 1927, says there is no right of action for the recovery of money or any other thing claimed under a gaming contract or bet. What was the nature of the transactions between plaintiff and defendant? They appear to have begun about the 8th February, 1881, when plaintiff addressed defendant as follows:—"I have been dealing in stocks for some three years in Montreal, and as I don't like the party who has been doing my business, and desire to make a change, I write you if you would act for me according to my instructions. I will give you my business as long as you do it satisfactorily. I note by the *Star* newspaper you are in the business. I will allow you same as I pay other brokers. I wish to deal in Montreal Telegraph stock only. My idea is to buy after a pretty smart decline in the stock and sell at a fair advance, not hold long. You may buy 20 shares at about 125 or better. Wire me when bought and I will remit you ten or fifteen per cent. margin as you like. If think safe you can buy 30 shares, but sell at a fair advance and send statement. I want you to use your

judgment, as I will place confidence in you." On the 16th March, plaintiff wrote: "Enclosed find \$65 as margin on 25 shares of Telegraph stock which you can purchase tomorrow if an opportunity offers, but don't go over 129½; if you can buy less do so. You may buy 25 shares more if you think it advisable, but not over 129½. I think it may drop lower. This will make 50 shares yet to buy as per order of to-day. I will remit you all the money you require to hold margins good should a break take place; you can sell it at about two cents advance unless market strong and advancing. If it shows a weakness after the advance takes place, then let them have it, and wire me as before." Some eight months afterwards, plaintiff, by letter of date 12th October, wrote as follows: "If Montreal Telegraph stock reaches 125, buy me fifty shares. You can buy 40 shares at 126, 10 at 127, 20 at 128, 15 at 129. I have lost so much I want to try and win some back if it is my luck. I want you to hold the order good, and act on it when the first opportunity offers. Hope you will be able to do something this time. Look sharp." On the 15th October plaintiff writes: "Gentlemen, enclosed find cheque to cover margin on stock bought, and provision in case of decline; make the interest as low as possible. If the stock goes to 33 sell it out and we'll buy again. Fill the balance of order if can at figures I gave you." On the 17th October defendant writes: "We have your favor of 15th inst., enclosing cheque for \$363. We note your order to sell, and will keep it before us. The rate for carrying is six per cent., and it is not likely to be increased unless the money market changes. We bought ten shares more, all we could get."

Looking at all the facts of the case, the Court has no difficulty in saying that plaintiff did not intend to pay for or take delivery of the stock in question. No delivery was made, and the same was bought for speculative purposes on borrowed money, with a view to a sale as soon as a small profit could be realized. No action lies under the circumstances. It may be added that the plaintiff was away from his residence when the stock fell, and defendant only sold to protect himself, and the remittance made by plaintiff for a margin was lost in consequence. The case of *The Bank of Montreal v.*

Macdougall, 28 Upper Can. C. Pleas, 345, cited by plaintiff, does not help this case.

The case of *Fenwick v. Ansell*, 5 Legal News, 290, cited by defendant, is directly in point.

Action dismissed.

Weir, for plaintiff.

Dunlop & Lyman, for defendant.

SUPERIOR COURT.

MONTREAL, March 10, 1883.

Before TORRANCE, J.

MCBEAN v. MCBEAN *et al.*

Partnership—Dissolution.

After dissolution of the partnership one partner has no authority to borrow money in the name of the firm for the purposes of the partnership business.

The plaintiff demanded from the defendants \$3,488.86 which he said he advanced to them to purchase grain in connection with their business as partners. The defendant Alexander G. McBean denied the liability, and set up that at the dates in question he was not partner with the other defendant Donald G. McBean.

PER CURIAM. The moneys in question were remitted by George McBean to the defendant Donald G. McBean as follows:—\$2,485.96 on the 30th June, 1882, \$436.27 on the 10th June, and \$566.63 on the 7th July. There had been joint ventures between the two defendants as evidenced by an agreement in writing, plaintiff's exhibit No. 1. It terminated on the 10th May, and plaintiff undoubtedly knew of the termination. Donald says that about the 19th May, he made with plaintiff similar arrangements to those which he had previously had with the defendant Alexander G. McBean. Mr. Tait, counsel for Alexander G. McBean, says that Donald had no authority to borrow for the joint account, and I see no right on his part to borrow money to pay the debts of the firm. It has been held that one partner, after dissolution, cannot give a bill or note in the name of the firm even for an antecedent debt; and although such partner is authorized to settle the business of the firm. Story, *Partnership*, § 322; *Pardessus, Société*, 3rd vol. pp. 431, 2. Plaintiff made remittances of money to Donald from time to time, and Donald applied this money to meet his liabilities generally whether contracted for plaintiff or otherwise. I think the plaintiff has failed to make out his case against Alex-

ander G. McBean, but he shall have judgment against Donald G. McBean.

Macmaster & Co. for plaintiff.

Abbott, Tait & Abbotts, for A. G. McBean.

COURT OF QUEEN'S BENCH.

(CROWN SIDE.)

MONTREAL, March 16, 1883.

Before RAMSAY, J.

REG. v. MILLOY *alias* DOOLEY.

Evidence—Examination of witness before Justice under 32-33 Vict., cap. 30, s. 29.

The examination of a witness under 32-33 Vict., Cap. 30, s. 29, was held inadmissible where there was no caption to the deposition, as given in form M, to show that a charge had been made against the prisoner, and that he, having knowledge of the charge, had a full opportunity of cross-examining the witness. The test of admissibility is the opportunity given the prisoner to cross-examine, he having knowledge that it is his interest so to do.

RAMSAY, J. The Crown proposes to put in the examination of the deceased in presence of the prisoner as to the circumstances of the murder of which the prisoner is now on trial, and have it read to the jury as direct evidence of the facts. The production of this examination is objected to on the ground that it was taken in the form of an information and complaint used when the accused is not yet arrested, that is to say, it is taken as though the complainant were seeking a warrant of arrest. It is argued that the Statute lays down a mode of procedure to be followed when the accused appears or is already in custody for this or any other offence, 32 & 33 Vic., c. 30, sec. 29, and that a form (M) is given by which it is prescribed that there must be a caption describing the offence "as in a warrant of commitment," and it is only after depositions are so taken that the Justice is authorized to commit the accused to prison or to bail him. The next section (30) then goes on to say how the justice shall administer the oath, and then continues, "and if upon the trial of the person accused, it be proved upon the oath or affirmation of any credible witness, that any person whose deposition has been taken as aforesaid, is dead, or is so ill as not to be able to travel, or is absent from Canada, and if it be also proved that such deposition was taken in presence of

the person accused, and that he, his counsel or attorney, had a full opportunity of cross-examining the witness, then if the deposition purports to be signed by the justice by or before whom the same purports to have been taken, it shall be read as evidence in the prosecution without further proof thereof, unless it be proved that such deposition was not in fact signed by the justice purporting to have signed the same."

The difficulty so far as the Statute is concerned turns on the interpretation of the words "whose deposition has been taken as aforesaid" Do they refer to the previous section or only to the provisions of section 30?

I am of opinion that these words apply to both sections, otherwise the deposition might have no relation to any charge at all, and it might be taken in some civil proceeding, over which a magistrate might have jurisdiction, which is evidently not intended. Nor do I think the objection is lessened by the terms of sec. 58, 32 & 33 Vic., c. 29, which permits the deposition taken in one case to be used in another, for the case is "in the preliminary or other investigation of any charge against any person," and this I think means "charge of any indictable offence." (See *Imp. Act 11 & 12 Vic., c. 42, s. 17*, and *Reg. v. Beeston*, Dears. p. 405). Here it does not appear on the face of the deposition that any charge at all was made against the prisoner, and it appears he must be charged with some offence. (*Mr. Greaves*, Russ. 893). The great test of admissibility is clearly the opportunity given the prisoner to cross-examine; that is to say, the full right to cross-examine, he having the knowledge that it is his interest so to do. This he cannot have till he is charged with an indictable offence. I attach no importance to the deposition being called an information.

On our Statutes, then, I should have no hesitation in saying that the deposition was inadmissible if it were not for a case of the *Queen v. Millar*, decided in New Brunswick, which is much in point. (5 Allen p 83.) If that case had been decided since Confederation I might perhaps have felt myself bound by the decision; but as it only has authority here as written reason, and as it was under a different Statute from that in force here, I cannot defer to it. If the Revised Statute of New-Brunswick

is identical with our Act, the learned reporter says it is *substantially* the same, (Ib. Note, p. 93.) I cannot accept the reasoning of the learned judges, more particularly as it appears by the report (5 Allen, p. 92), that the majority of the Court joined in the judgment with great reluctance.

Radborne's case (1 Leach, C. C. 457) seems to have had great weight in the decision in *Millar's case*, but I do not think Radborne's case decides anything that can be applied to the case before us. We are not told why the deposition was admitted. Garrow for the Crown argued that it was admissible either as a dying declaration, or it was admissible because "anything that was said, either by a prosecutor, a prisoner or witness, in the presence and hearing of each other, although said in common conversation, was admissible evidence in all Courts both criminal and civil." If it was admitted as a dying declaration, it does not apply to the case before us, and if on the ground that whatever is said in presence of the prisoner may be proved, the argument is altogether fallacious. What is said in hearing of the prisoner is not admitted as evidence under oath of what took place before; it is admitted as evidence of how the prisoner acted when accused of guilt. By the production of the deposition it is intended to establish under oath the narrative of the witness who cannot be examined. It may, however, be said that the decision in Radborne's case was cited approvingly in *Beeston's case*, and that its applicability to that case depends on its being assumed that it, in effect, decided that a deposition where there was no charge might be admitted, and more so therefore when the question was as to the admissibility of the evidence taken on one charge in any other charge. If this be accepted as the expression of the state of the law after *Beeston's case*, then the disposition of our Statute 32 & 33 Vic., cap. 29, sec. 58, understates the law in a curious manner. I cannot, however, adopt this view, and I must therefore reject the deposition, although in fact, it appears, the prisoner did ask one question in cross-examination. It must be understood that this decision goes no further than to reject this deposition as taking the place of Nesbitt's narrative under oath of what occurred.

C. P. Davidson, Q.C., and Ouimet, Q.C., for the Crown.

F. D. Monk and Cornellier for the prisoner.

The Legal News.

VOL. VI. MARCH 31, 1883. No. 13.

THE VETO QUESTION.

The discussion of a question that savours of politics usually occupies more attention nowadays, or at any rate occupies more of the space of the daily journals, than a great war carried on after sterner methods. Amidst much upon the veto question that is partisan, we find a little note upon the subject in the *Bystander*, from the pen of Mr. Goldwin Smith, who may be assumed to express an independent view:—

—As to the Streams bill, there is no denying that the Dominion Government has the veto power, nor is there ground for saying that the power was not intended to be used. We are dealing not with antiquated practices or vague traditions, but with a constitution recently framed, which must be supposed to be operative in all its parts. Of course the veto is not to be exercised without good reason, but two good reasons at least for its exercise may be assigned. One is, an excess of powers on the part of the Provincial Legislature: the other is a breach of the fundamental principles of public morality and justice by which all legislation ought to be restrained. Nothing can be more likely than that such bodies as our Local Legislatures should occasionally betray an ignorance of the great rules of jurisprudence and require to be called to order by superior authority; such a check is made more essential by the increasing tendency of the machines to ostracise the best intellect of the province. The bill breaking Mr. Goodhue's will was a case in point, and formed a proper subject for the veto. Whether the Streams bill is actually a breach of the principle which forbids legislative aggression upon vested interests is a question which turns partly upon disputed matters of fact, and on which there is sincere difference of opinion among persons free from the party bias. On its face the Act certainly seems to be one conferring improvements and assigning only an arbitrary compensation; it also looks very like a law directed against an individual under colour of a general enactment. In any case, however, the contention of Ontario ought to be

that the bill is unobjectionable in principle, not that the veto is a nullity."

The Act referred to is an Act "for protecting the public interest in Rivers, Streams and Creeks," which has been thrice passed by the Legislature of Ontario, and thrice disallowed by the Governor General on the advice of the Privy Council.

THE SEDUCTION BILL.

"Violent legislation is the nostrum to which minds of a certain type are ready to fly whenever they see anything amiss, without considering what the general effect will be." So writes Mr. Goldwin Smith, in the same journal, and we think some of our local as well as federal legislators should give heed to the words. They occur in some observations upon the Charlton seduction bill, and the entire paragraph is worth reading:—

"Mr. Charlton moves, practically, to make the illicit intercourse of the sexes a crime, and punish the male offender alone. To protest against the injustice would be idle; philanthropy likes injustice. But does not Mr. Charlton see that he is taking away the principal safeguard of female purity by declaring, as in effect he proposes to do, that breach of chastity is no offence in the woman, and that even when she allures a lover, as it is preposterous to doubt that licentious women often do, she is to be regarded as a passive and guiltless victim? Law will, as usual, mould opinion, and less shame will attend what the law proclaims to be merely a wrong involuntarily undergone. In civilized countries a woman is protected from violence by the Government; against the enemy in her own breast she must protect herself; she is the keeper of her honour, and she knows that a promise is not marriage. It is singular that those who wish to call her to the exercise of political power should at the same time treat her as a creature devoid of sense and will. Violent legislation is the nostrum to which minds of a certain type are ready to fly whenever they see anything amiss, without considering what the general effect will be. A new weapon will be put into the hand of a female black-mailer, to whose machinations the characters of clergymen and medical men especially are exposed, as has just been proved by a signal example in this country, and by a

tragical example in England. There are varieties of character, female as well as male, and female as well as male fiends. Of this enthusiasts take no heed: male reputations, even when they are of the highest importance to the community, being beneath the notice of benevolence. By the provision that the offender shall be let off if he can plead that he has married the girl, a vista of conspiracy, forced marriage, and domestic misery is opened to view. Any woman who can entrap a foolish youth will be able to compel him to marry her on pain of being put in the dock. Experienced lawyers say that real cases of seduction are rare; but if Mr. Charlton's bill becomes law, fictitious cases of seduction are likely to abound. Such Acts have been passed, no doubt, by Legislatures in the United States. Legislatures in the United States will for show pass anything that is sentimental with more ease than they would pass an effective law against corruption; but to what extent have these enactments been put into execution? The illicit intercourse of the sexes is a sin which, besides destroying purity and beauty of character, poisons the very well-spring of human happiness. A crime in the legal sense it is not; much less is it a crime in one party alone. In the real interest of morality, it is to be hoped that Mr. Charlton's proposal will never become law."

THE NESBITT MURDER.

The Nesbitt case is in some respects of considerable interest, and the task of charging the jury was of more than ordinary delicacy. The learned judge who presided at the trial has put the substance of the charge in writing, and we believe its importance will be considered sufficient, more especially by those of our readers practising in criminal courts, to justify its reproduction here.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, March 20, 1883.

Before LORANGER, J.

ANDERS V. HAGAR.

Exception to the form—Demurrer.

A defendant who is sued for the recovery of a penalty under 31 Vict., cap. 25, sec. 37 (Q.) by a plaintiff who brings the action in his own name instead of suing as well for the Crown as for himself, should set up this defect by demurrer and not by exception to the form.

The plaintiff instituted an action in his own name against the defendant who was President

of the Pioneer Beet Root Sugar Co., for a penalty of \$100 for alleged refusal to exhibit the Company's books, and \$50 damages suffered in consequence of such refusal. The defendant met the action by exception to the form, saying that the plaintiff should in virtue of the Act 31 Vict., cap. 7, sec. 7, have brought the action as well for the Crown as for himself, and claimed only one-half of the penalty for himself. The plaintiff thereupon obtained leave to amend the conclusions of his declaration so as to claim only a moiety of the penalty for himself and the balance for the Crown. The defendant then inscribed on the exception, pretending that as the writ had not been changed, and as the plaintiff was still suing in his own name, the action as amended was still bad and should be dismissed.

LORANGER, J., held that, although the action was undoubtedly badly brought, the question should have been raised by a plea to the merits, as this was not a ground for exception to the form under Art. 116 C.C.P.

Exception dismissed.

F. X. Choquet, for plaintiff.

Wotherspoon, Lafleur & Heneker, for defendant.

[The Court of Q.B., March 29, without expressing any opinion on the merits of the question, granted leave to appeal from the above judgment.]

SUPERIOR COURT.

SHERBROOKE, January 31, 1883.

Before BROOKS, J.

LUCKE et al. v. WOOD.

Compensation—Unliquidated damages.

A claim of unliquidated damages, ex delicto, e. g., damages caused by wrongful issue of capias, cannot be pleaded in compensation to an action for goods sold.

This was an action for \$41.02, instituted in the Superior Court, commenced by issuing a *capias* August 10, 1880, followed by a seizure on the 27th of the same month. A *capias* had first issued in July, returnable in August, but the plaintiffs, fearing that their proceedings were irregular, discharged the defendant from arrest, and took out a second writ.

The defendant did not petition to set aside the *capias* or seizure, but filed three pleas:—
1st. General issue.

2nd. A denial of certain items of the account, and allegation of payment of others, and alleg-

ing that in any event he was entitled to set off damages caused by the first arrest, which had been abandoned; and

3rd. That the second arrest was illegal, as the defendant could not be twice arrested for the same debt.

Mr. *Merry*, for plaintiffs, urged :

That the account sued upon had been fully proved by the evidence of witnesses, and the admissions of defendant, and that the alleged damages, not being *clairs et liquides*, could not be pleaded as a set-off to plaintiffs' claim for goods, wares and merchandise sold; that sequestration of property by defendant had been fully established by plaintiffs.

Mr. *Brown* for defendant, urged :

That the account had not been established to the extent of \$40, consequently the action had been improperly brought in the Superior Court; and further, that in any event defendant had proved disbursements, to the extent of \$18.25, made by him in getting released on bail under the first *capias*, and that he was entitled to set off damages easily proved against plaintiffs' account, and that the action must be dismissed. Also, that defendant could not be arrested a second time.

Brooks, J. Owing to the account sued upon being so small, I have examined very carefully the proof, as the reduction of a small sum would cause the *capias* to be set aside, but I find the account proved. The defendant himself was, on more than one occasion, furnished with a detailed statement, and made no objection until arrest. d. He, on several occasions, stated that he only owed plaintiffs a little over \$40, and that they should not have arrested him for so small a sum. He has, moreover, pleaded in bad faith, denying articles which are proved, and alleging payment of others by one Moulton, which he does not attempt to establish, though Moulton was examined

As to the second ground, the right to off-set unliquidated damages caused by former arrest, I do not think this can be legally done. C. C. 1188 says that compensation takes place between debts which are equally liquidated and demandable. Does this apply to the present case, even if damages were proved?

The case of *Hall v. Beaudet*, 8 L. C. R., p. 75, (1856) has been cited, as sustaining defendant's views, but a reference to the report will show

that while a majority of the Court held that an account for goods sold and delivered might be opposed to a debt due under a notarial obligation, Ch. J. Sir L. H. Latontaine dissented, and the majority of the Court applied the principle as limited to cases *sounding in money*. That under the old French law limiting the advantage to opposite debts, *claires et liquides*, owing to the development of trade, an evil grew up requiring a remedy, and which, Mr. Justice Badgley says, "was supplied by the jurisprudence of the French Courts, and the opinions of acknowledged and eminent French jurists, by which the principle of compensation was enlarged and extended to a class of debts susceptible of liquidation by a *ready proof at hand*, but refusing the application to such as were conditional, uncertain, dependent upon the settlement of litigated accounts, *comptes de successions, de tutelles*, with all their intricacies and delays of adjustment, or debts not yet due, or when the object set off was not easily appreciable in money, and such like; to all these the rigor of the rule was strictly applied in the same manner as in England, where mutual debts may be set off, *not in actions for unliquidated damages*, nor for costs, as upon the case, trespass, replevin, or *détenué*, but for debts in actions of *assumpsit*, debt and covenant for the non-payment of money, and for which an action of *indebitatus assumpsit* might be maintained, and such like, and where the debts were due at the commencement of the action, and in the same right." "On appelle une dette, claire et liquide, laquelle est due présentement et dont le défendeur peut faire sa demande, étant due par écrit ou autrement, ou que les parties en conviennent."

Is the claim set up by defendant for damages alleged to be sustained by him by reason of former arrest, of such a nature as to entitle him to have it compensate the account sued for goods, wares and merchandise?

To establish his claim defendant is not only bound to prove the amount of damage, but to prove that the plaintiffs are liable to pay these damages.

Lacombe says: "*Extenditur etiam ad ea que facile et intra breve tempus, liquidari possunt.*"

Can it be said that a claim for unliquidated damages is of such a nature? The claim, if arising *ex contractu*, would be differently viewed, but arising *ex delicto*, I cannot declare it such a

claim as would compensate the account sued for.

Judgment for plaintiff with interest and costs.

Merry for plaintiffs.

Brown for defendant.

COURT OF QUEEN'S BENCH.

[Crown side.]

MONTREAL, March 19, 1883.

REGINA v. MILLOY *alias* DOOLEY.

The prisoner was on trial for the murder of Wm. Nesbit.

RAMSAY, J., charged the Jury as follows :—

Gentlemen of the Jury, The length of this trial has subjected you to some inconvenience; but you will agree with me, I think, in saying that the counsel for the defence were fully justified in seeking the adjournment on Saturday evening, for it is now evident that we could not have finished the trial that night.

Except for the formal testimony of the Coroner to establish the death of Wm. Nesbit, the evidence of the Crown begins with the departure of the deceased on the morning of the 19th of January last, from his house to go to the stable, where the fatal blow was given. I shall invert the order of the evidence, as thus laid before you, and begin with the death of Nesbit, in order that we may at once get rid of those questions, which do not appear to be susceptible of difficulty.

First, the cause of death is evident. The deceased, a man in high health, leaves his house in the morning, and returns an hour after with a bullet wound in his throat. The ball passed in under the left ear and lodged in the muscles of the right jaw. The wounded man, with the aid of his wife, managed to harness a horse and attempted to reach the house of his brother-in-law, two or three miles distant, but overcome by weakness, he was obliged to stop at the house of another relative, whence he never could be removed, and where he died at the end of a week.

It requires no great effort of science to arrive at the conclusion that he died of the effects of the wound, and I should not have thought it necessary to do more than allude to the cause of death, had it not been for an attempt which has been made by the defence, to show that Nesbit had not died of the wound, but owing to the mal-practice of the medical men who attended him. It is contended that you have to decide as to the immediate cause of death, and

that if you think the deceased would have recovered had he been better or differently treated, the prisoner is not liable. You have been further told that the criminal law on this point is unreasonable and barbarous, and that a doctrine more sensible than that of the common law should now usurp its place. Firstly, the law does not attempt to deal with mediate and immediate causes. No one has yet been able to show what an immediate cause is, more than to determine the size of an atom. What the law considers is the proximate cause. Again, as to the doctrine of the common law, it is necessarily in accordance with common sense, for it is the creature of reason and experience; and if it can be shown that a doctrine is opposed to reason, it cannot be that of the common law. With regard to the question before us the rules of law are perfectly clear and reasonable. If a man strikes another with a deadly weapon, or in such a way as to show that he intended to kill him, and he dies, the man striking the blow is guilty of murder. If the assailant strikes another illegally, and without the intention to kill, and the man struck dies, then the one who struck is guilty of manslaughter. In either case the mal-practice or the negligence which has brought about the fatal catastrophe is at the risk of the wrong-doer, unless it can be clearly shown that the death has an origin perfectly independent of the assault. Roscoe, Cr. Ev. 703.

Having established the cause of death, the next step in our inquiry is as to the instrument used. Have we found the pistol with which the fatal wound was given?

On this point we have a mass of evidence. In the first place the pistol was found on the 19th January close to the scene of the murder. It was found in the snow in the angle of the road leading to Nesbit's house from the high road, and on the left side of the road going from Montreal to Longue Pointe. Secondly, the bullet found in the wound fits the pistol. An effort was made to show that the ball would not fit the pistol, but this objection was disposed of by the testimony of the armourer. He tells us that such a pistol required a tight fitting ball to give it force, and that the ball in the wound evidently received a dent by striking some hard substance, (probably the right jaw bone) and that it was this prevented its entering the muzzle. He remarked also that the pistol could be

loaded either by the muzzle or by unscrewing the barrel. Again, we have ammunition and other bullets found scattered along the road in the neighborhood of the place where the pistol was found, and the bullets so found are of the same weight and size as the bullet found in the wound. Lastly, the pistol when found was loaded, the charge has been drawn in your presence, and the charge consists of a bullet, exactly of the same weight and size as that found in the wound, and as those found on the road, also of paper used as a wad of precisely the texture of the paper wad found in the wound, and of shot similar to that found on the road. There was also a piece of a common clay pipe found in the charge, which only becomes important at another stage of our enquiry. It seems to me then to be proved, beyond a shadow of doubt, that the weapon produced in Court during this trial is the instrument used to kill Nesbit.

The third question is, by whom was it used? The evidence on this point is chiefly circumstantial. I say chiefly, for I shall have to draw your attention to one piece of the evidence which is not usually classified as circumstantial.

At different times there has been much discussion as to the respective value of these two kinds of evidence, and also as to their different qualities. As an abstract question, the mind has to perform the same operation in judging on what is called direct evidence, and on what is called circumstantial evidence; but, practically speaking, there is a very notable difference. In direct evidence, the cause and effect are so closely allied that the mind draws its inference without being conscious of the operation it performs, while in circumstantial evidence the inference is drawn deliberately. Taylor on Evidence, § 56; Wills on Cir. Ev., p. 16.

But whether the evidence laid before you be attributable to one class or to another, to be sufficient, it must produce moral conviction of the prisoner's guilt; that is to say, it must be incompatible with any reasonable theory of the prisoner's innocence. Now, let us see whether the facts proved necessarily lead to the inference of the prisoner's guilt.

First, we have the evidence of Gauthier who tells us that between 5 and 6 in the morning of the 19th January, the deceased and he went to the farm-buildings to do their morning work.

They had two lighted lamps, they entered by the stable door, and on getting to the cow-house they found the prisoner in the alley between the cows. Deceased began to milk his cows, and the witness to clean out the stable. These operations took about an hour. During this time no conversation passed, except that deceased, addressing the prisoner, asked him if he were smoking, to which the prisoner answered, "no." While witness was at work, prisoner followed him about as if looking at what he was doing, but without helping him, and on one occasion, when the witness carried out some manure into the yard, the prisoner made a movement at witness with an iron shovel, as though he would strike him. At the time witness thought he was playing, and attached no importance to his movements. By the light of what we now know they may, however, not be without significance. He may have been anxious for the departure of the witness.

The witness having finished his work, deceased told him to take the horses, eight in number, to water them at a well further off than the dwelling-house, and a little more remote than the farm-buildings from the dwelling-house. Gauthier had just reached the well when he heard Mrs. Nesbit, from the back door of the kitchen, calling to him that his master was hurt and to come immediately. On going to the house, witness found deceased lying unconscious on the floor. With the aid of Mrs. Nesbit he got deceased up, and supported him to the sofa in the inner room. The moment deceased was raised he rallied a little and said "a lamp exploded," "it's Tim shot me." Tim was the name by which prisoner was known when a servant in the deceased's service. It was proved that in reality no lamp exploded, so that this part of the statement was incorrect, but the other part of the statement is evidence for you to consider. It is not admitted as evidence as a dying declaration, but as being part of the *res gestæ*, and faith is given to it because it could not be concocted and is not likely to be false. Roscoe, 23 and 24. Reg. & Lunney, 6 Cox.

Next we have Gauthier starting to go to Kidd's for assistance, and his recommendation to Mrs. Nesbit to fasten the door, as the man, who was still about, might return to finish his work when witness was gone. The advice was well-timed, and Mrs. Nesbit fastened the kitchen door.

No sooner had Gauthier left than the prisoner came to the house, broke open the kitchen door and tried to force an entry into the dining-room. Being resisted and threatened by Mrs. Nesbit, and seeing, probably, that if Gauthier had gone to alarm the neighbours, he might be surprised on the premises, the prisoner took one of deceased's horses and started for the high-way. As to all this part of the case Mrs. Nesbit's evidence is complete and direct. Hearing the kitchen door burst open she opened the door leading from the dining-room into the kitchen, and saw the prisoner making his way across the kitchen to the steps leading to the dining-room. Later, from the front door, she saw him going to the barn for a horse, and start to go down the winter road on horseback.

The next witness, Reeves, saw the prisoner throw something away near Nesbit's gate, and then he saw him trying to cover up something, both on the north and south side of the public road. When witness came up to prisoner he asked Reeves to take him up; and when Reeves refused, prisoner said "I'll lick you." When passing the gate Reeves saw a black horse going slowly up the road alone towards Nesbit's house.

A little nearer town Leonard saw prisoner, and the prisoner then asked Leonard to take him up, which Leonard refused. Both Leonard and Reeves were struck by the appearance and manner of prisoner. Just as Leonard passed, Mrs. Levasseur, coming from the other direction, and so meeting prisoner, saw him emptying his pockets and bend down to hide something in the snow. You have been told this witness could not see the prisoner five acres off. The distance does not appear to be so great; but whatever the distance was, she says she saw him, and as a proof of this, she sent her little boy to look for what had been left where she had seen prisoner empty his pockets, and the boy brought back bullets and shot.

The evidence as to the attempt of the prisoner to conceal something is not an invention, for Richard, Gauthier, Buchanan, Hogg, Mme. Levasseur and Trempe prove that the pistol, bullets, shot, powder, paper and caps, were all found exactly at the places described by Reeves and Mme. Levasseur as being the places they had seen prisoner engaged in concealing something in the snow.

On the 20th January, the father of the deceased

found the cover of a box for holding percussion caps in the stable at Nesbit's.

Again, there is another little link in this chain of evidence. The pistol was found re-loaded, and it seems the prisoner, if it was he who shot deceased, had plenty of time to re-load the pistol after his attack on deceased and his going to the house to force an entry.

The similarity of the known mode of proceeding of the prisoner, and that of the murderer is not unworthy of consideration. The prisoner awaited the departure of Gauthier, to get help, which, doubtless, he saw, before going to break into the kitchen; and the murderer, whoever he was, awaited the departure of Gauthier before making the assault on deceased.

Again, the prisoner remained alone with deceased when Gauthier went to water the horses, and the attack on deceased followed so immediately the departure of Gauthier that it seems almost impossible that any one other than the prisoner could be the assailant. On this point the prisoner could give us some information, but he has persistently refrained from giving any account of what took place between him and deceased after Gauthier left. Where was he from the time Gauthier left until he broke open the kitchen door, is a question one cannot fail to ask. Directly questioned as to the attack, he said he did not even know what they were talking about.

The law does not compel the prisoner to speak, but silence has its indiscretions, and the fact that the prisoner kept silence under such peculiar circumstances may be considered by the jury as adding force to the suspicions which his position and actions naturally created, although not by itself a presumption of guilt.

If we had nothing beyond this to go upon a very strong case of circumstantial evidence would be made out, but we have now to look at facts which even more directly point to the prisoner as the guilty party. He was searched twice at Greece's. Before the second search he was asked if he had any fire-arms about him. He answered, he knew nothing about fire-arms. Nevertheless, on his person were found 17 caps, a ramrod, and a pistol cover exactly fitting the pistol, and a pipe with the end of the stem broken. You will remember that a piece of the glazed end of a clay pipe was found in the pistol when the charge was drawn before you, and this seems

to correspond with the broken stem of the pipe found on the prisoner.

The last point I have to draw your attention to in the evidence of the Crown is the question put by prisoner to deceased after the latter made his statement before Mr. Dugas. As you will remember, the production of Nesbitt's deposition as direct evidence of the assault was objected to on the part of prisoner, and his objection was maintained. It is not a dying declaration, because there is no evidence that Nesbitt knew he was dying when he made it, but it is produced as evidence of what took place in the presence of the prisoner, and of his demeanour and action on hearing this grave accusation. The prisoner being asked by the magistrate what he had to say, having heard what Nesbitt said about the shooting and the assault with the shovel, he asked: "Is it not true that you ran after me and knocked me down?" The answer was unfavorable and he once more took refuge in silence.

This question is not what is called circumstantial evidence. It is an admission, though only an implied admission, of having fired the fatal shot, but it is a direct admission of an assault.

There are reasons which may be urged and fairly so, to explain why an accused person does not speak when his conduct is open to suspicion. He may fear by some indiscretion to heighten the presumptions against him of guilt, or he may dread misinterpretation. The prisoner is probably an old soldier, his counsel say he is, and he was therefore fully aware of his right to say nothing. But the dangers which suggest this reserve are at an end. He has had two months to arrange his defence, and he has now the aid of learned counsel able and willing to put his defence, if any he has, in the best shape before you. Yet to what does it amount? He says the bullet wound was not the cause of death. We have already dealt with that sophism. He now says, there is no proof of his having shot deceased. I think you will have no difficulty in dealing with that pretention. And finally he says that even if you believe he fired the shot, there is no evidence that he did so with premeditated malice, and that it was, in effect, an accident. In support of this defence it is agreed, that there was no

motive for a crime, that an evil intention cannot be presumed, and that no guilty man would have acted as the prisoner did.

Motive, like character, is only important in cases of doubt; it is of no importance when the testimony is conclusive. Again absence of proof of motive, in any case, is of little moment, as a bad man will find sufficient excuse for crime in what appears trivial in the extreme. In fact no motive for crime is sufficient. Again, you are told that you cannot presume the malicious intention. The law says you may gather it from the act. If a man unintentionally inflicts a deadly wound, and the wounded man dies of the wound, it is for the assailant to show that he did not premeditate what is the natural or even possible consequence of his act. Knowing this, the defence says it was an accident, and there was no intentional killing at all. If that were true, how do they explain that the prisoner did not assist the deceased to the house, and that he broke open the door when he did go there? Did he re-load the pistol to give an opportunity for another accident? Why the concealment of the pistol and the ammunition? And how did it happen that when he saw the deceased lying at death's door, owing to a wound accidentally inflicted by him, he uttered not a word of regret or sympathy? He would hardly acknowledge that he knew this man who had been his employer up to the day before, and whom he had met not two hours before in high health, and who, but for his act, would be so still. But it is a mere waste of words to dwell further on this defence. It is urged in utter despair, for providentially the Crown has been able to lay before you a chain of circumstances which seems to connect the prisoner indissolubly with the guilty act.

One other point was put forward in favour of prisoner, it is the certificate of good service, found in his possession. In face of the change of name this certificate proves nothing. If he be Timothy Milloy and not Timothy Dooley, then why did he abandon the name under which he obtained a good character? This is unexplained. He, therefore, has no right to any more credit for good character than arises from the ordinary presumption of innocence.

In matters of this kind one does not desire to augment one's responsibility. It is not for me to pronounce the fatal word, but I should be

wanting in my duty if I concealed from you the effect the evidence has had upon my mind. I have only to add that I have no charge to give you as to doubt, for of doubt I have none,—nor shall I speak to you of a possible verdict of manslaughter. If the witnesses are to be believed, the prisoner is guilty of murder as laid in the indictment, and I should regard a verdict of manslaughter as a calamity.

[The jury found a verdict of *Guilty*.]

THE DEATH PENALTY.

Lord Justice Stephen, in his new work on the history of the Criminal Law of England, says: "My opinion is that we have gone too far in laying it"—the punishment of death—"aside, and that it ought to be inflicted in many cases not at present capital. I think, for instance, that political offences should in some cases be punished with death. People should be made to understand that to attack the existing state of society is equivalent to risking their own lives. In many cases which outrage the moral feelings of the community to a great degree, the feeling of indignation and desire for revenge which is excited in the minds of decent people is, I think, deserving of legitimate satisfaction. If a man commits a brutal murder, or does his best to do so and fails only by accident, or if he ravishes his own daughter (I have known several such cases), or if several men acting together ravish any woman, using cruel violence to effect their object, I think they should be destroyed, partly in order to gratify the indignation which such crimes produce, and which it is desirable that they should produce, and partly in order to make the world wholesomer than it would otherwise be by ridding it of people as much misplaced in civilized society as wolves or tigers would be in a populous country. What else can be done with such people? If William Palmer had not been hanged in 1856, he would probably have been alive at this day, and likely to live for many years to come. What is the use of keeping such a wretch alive at the public expense, for say half a century? If by a long series of frauds artfully contrived a man has shown that he is determined to live by deceiving and impoverishing others, or if by habitually receiving stolen goods he has kept a school of vice and dishonesty, I think he should die.

These views, it is said, are opposed to the doctrine that human life is sacred. I have never been able to understand distinctly what that doctrine means, or how its truth is alleged to be proved. If it means that life ought to have serious aims and to be pervaded by a sense of duty, I think the doctrine is true, but I do not see its relation to the proposition that no one ought ever to be put to death. It rather suggests the contrary conclusion as to persons who refuse to act upon it. If it means only that no one ought to be killed, I do not know on what grounds it can be supported. Whether life is sacred or not, I think there are many cases in which a man should be ready to inflict, or if necessary, to suffer death without shrinking. As however these views are at present unpopular and peculiar, and in the present state of public feeling on the subject it is useless to discuss this matter at length, no good purpose is served by making specific proposals which no one would entertain; but I may remark that I would punish with death offences against property only upon great deliberation, and when it was made to appear by a public formal inquiry held after a conviction for an isolated offence that the criminal really was an habitual, hardened, practically irclaimable offender. I would on no account make the punishment so frequent as to lessen its effect, nor would I have any doubt as to the reason why it was inflicted. I suspect that a small number of executions of professional receivers of stolen goods, habitual cheats, and ingenious forgers, after a full exposure of their career and its extent and consequences, would do more to check crime than twenty times as many sentences of penal servitude. If society could make up its mind to the destruction of really bad offenders, they might, in a very few years, be made as rare as wolves, and that probably at the expense of a smaller sacrifice of life than is caused by many a single shipwreck or colliery explosion; but for this purpose a change of public sentiment would be necessary, of which there are at present no signs."

GENERAL NOTES.

Sir George Jessel, Master of the Rolls, has died somewhat suddenly, and has been succeeded by Mr. Horace Davy, Q.C.

The Tishborne claimant, who has now been nine years in prison, is 54 years of age, and his health, thanks to the regimen of English penal establishments, is pronounced to be good.

The Legal News.

VOL. VI. APRIL 7, 1883. No. 14.

APPEAL BUSINESS.

The March Term in Montreal opened with 106 inscriptions. Of these 28 cases were argued. One appeal was dismissed, the appellant not filing any factum; two other appeals were struck, the cases having been settled by the parties; making a total of 31 cases removed from the list. Judgment was rendered in four cases heard during the March Term, the decision of the Court below being in each case confirmed. Judgment was also rendered in sixteen cases standing over from the January Term; in eight cases the judgment was reversed, reformed or modified, and in the other eight cases the decision of the Court below was confirmed. Two reserved cases were also decided, the conviction in each case being maintained.

CONTRACT FOR SERVICE.

In the case of *Everson v. Powers*, before the New York Court of Appeals, the question was as to the rule of damages for wrongful dismissal of an employee. The action was brought before the expiration of the term. The Court of Appeals held that where a person employed for a definite time, at a gross sum, is unlawfully discharged before the expiration of his term, he may recover as damages, the difference between the contract price and the amount received by him with what he was enabled to earn during the term after his discharge. Judge Tracy said: "Where the cause of action is commenced during the term, but the trial occurs after the expiration of the term of service, we can see no reason why the plaintiff may not be permitted to recover the same damages that he would have been entitled to recover had the action been commenced after the expiration of the term."

IMPROPER USE OF TELEPHONE.

In *Pugh v. Telephone Co.*, before the District Court of Cincinnati, the question was whether Pugh had forfeited his right to use the telephone by "damning" the company over the

wire. The rule prohibited the use of "improper or vulgar language." The court said in substance that it was hardly necessary, by its understanding of the rules of society, to go into an examination as to whether the word "damn" is profane or vulgar. Judge Barr of the United States District Court of Kentucky had already held that the word "damn," while not "obscene," was to be classed as "coarse, unbecoming, and profane," and in view of all the circumstances in the present case under which the word was used, it was patent to a majority of the court that it was used with a vile, low and insulting spirit, and if not profane, was manifestly improper. The rule prohibiting the use of "improper or vulgar" language was certainly a reasonable rule. "The telephone reaches into many family circles. It must be remembered that it is possible, from the peculiar arrangement of the instrument, to have a communication that is intended for one individual reach another. All communications, therefore, should be in proper language. Moreover, in many cases the operators in the exchanges are many of them refined ladies, and even beyond this, all operatives are to be protected from insult. Besides, the inventors have a right to be protected, and have their instrument placed in a respectable light before the world, otherwise it might go out of use." One judge dissented on the narrow view that "damn" is not profane. The *Albany Law Journal* remarks that in considering the defendant's right to cut off the plaintiff for "damning" over the wire, the Court, as may well be supposed, could not find any case exactly in point. "The nearest approach is *Pendegrast v. Compton*, 8 C. & P. 462, an action of damages, by a captain in the army, for breach of contract by a ship captain to carry the plaintiff and his wife as cuddy passengers on a voyage from Madras to England. The defendant undertook to justify by showing that 'the conduct of the plaintiff was vulgar, offensive, indecorous and unbecoming,' and constituted good cause of exclusion from the cuddy. The Court said: 'There is some evidence that he was in the habit of reaching across other passengers, and of taking potatoes and broiled bones with his fingers. It would be difficult to say, if it rested here, in what degree want of polish would, in point of law, warrant a captain

in excluding a passenger from the cuddy. Conduct unbecoming a gentleman, in the strict sense of the word, might justify him; but in this case there is no imputation of the want of gentlemanly principle.' The poet says (very ungrammatically),

'To swear is neither brave, polite, nor wise;' but leaving out of question the precise moral status of the word 'damn,' we think the court were right in justifying the shutting off of Mr. Pugh, on the ground that his language might accidentally startle some innocent 'family circle,' or shock the 'well-disposed females,' who are the 'operators at the Exchange,' especially as the offender refused to promise not to do so any more, or as he phrased it, to 'eat dirt.' The telephone is a very vexatious institution at times, but those who would use it should turn away their heads and speak in an 'aside' when they are provoked to bad language."

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, March 31, 1883.

TORRANCE, DOHERTY, RAINVILLE, JJ.

[From S.C., Ottawa.

MANSFIELD v. CHARETTE et al.

Suretyship—Extension of Contract.

The proof of the extension of a contract of suretyship, where the sum in question exceeds \$50, must be made by writing or by the oath of the adverse party.

The judgment here was against Charette and Mackay, two defendants, jointly and severally. Mackay had employed Charette to draw out lumber on the Gatineau River in the season of 1880-81. On the 2nd December, 1880, an agreement was entered into between Mansfield and Charette by which Charette agreed to pay Mansfield \$3 per mile or fraction of mile per 1000 cubic feet for hauling said timber. Mansfield asked for the security of the defendant Mackay, who accordingly addressed him a letter about which there was no difficulty. Later on a supplementary agreement was made between plaintiff and Charette, by which Charette agreed to allow an additional sum of one quarter of a cent per mile. Plaintiff contend-

ed that Mackay had notice of this, agreed to it, and became surety for the further sum. Plaintiff also said that this meant per foot, while Charette held that he intended it to mean per 1000 feet.

The Court below maintained plaintiff's pretension and condemned the defendants jointly and severally to pay a balance of \$730.

Mackay appealed, and contended that there was no legal proof of his having become surety for the second agreement of the 6th January, 1881, and further that in a case of doubt the contract must be interpreted as meaning per 1000 feet and not per foot. He contended that suretyship was not presumed; C.C. 1935, and could only be proved by a writing, C.C. 1335, or his oath, and there was no such proof.

The Court of Review held that there was no legal proof to bind Mackay, and therefore that the judgment against him should be reversed, and the action dismissed.

Judgment reversed.

T. P. Foran, for plaintiff.

John Ayles, for defendant Mackay.

COURT OF REVIEW.

MONTREAL, March 30, 1883.

TORRANCE, DOHERTY, RAINVILLE, JJ.

[From C.C., Beauharnois.

HERBERT v. LA CORPORATION DE LA PAROISSE DE STE. MARTINE.

Municipal Corporation—Neglect to protect a dangerous part of the highway by a railing.

This was an action of damages to recover the value of a horse alleged to have been drowned through the negligence of the municipality in not having a proper railing in a dangerous part of the highway. The action was dismissed.

TORRANCE, J. The Municipal Code, Art. 788, required the corporation to put railings or *garde-fous* in dangerous places. The evidence appeared to be strong in the case that the place was a dangerous one. Eustache Bergevin says so. He was mayor. George Brault said that it was usual to put a *garde-fou* at such a place. Primeau said it would have been better to have had a *garde-fou*. Ulric Martin said it was a dangerous place to upset in at night, and that it would be better to have a *garde-fou* there. Elie Cimon and Théophile Doré said the same

thing as to the danger of the place. Louis Maheu, who had been mayor, said it was possible to put a *garde-fou* there, though there had been none there before, and that since the accident, orders had been given to put one.

Against the claim it was proved that the plaintiff had said that if the reins had been in his hands, the accident would not have happened. He had dropped a piece of iron out of his waggon a few yards below and had got out to recover it, and doing so, had placed the reins in the hands of his nephew who sat by him in the waggon. The horse took fright for some unknown reason, reared and ran over a steep declivity on the side of the road, unprotected by a railing, into the river, where he was drowned. The Court here found no negligence in the driver who was strong and had experience. Even in a case of doubt, Sourdat said as between the individual and the municipality, the liberality should lean in favour of the proprietor. Tom. I, p. 435, n. 433.

The Court of Review was of opinion that a clear case was made out against the municipality, and that it should pay damages assessed at \$150, and costs, for the loss of the horse.

J. E. Robidoux, for plaintiff.

L. A. Seers, for defendant.

SUPERIOR COURT.

SHERBROOKE, March 31, 1883.

Before BROOKS, J.

HUDON *et al.* v. RAINEAULD *et al.*

Exception à la forme—Name of defendant.

The action was to set aside a deed of sale by one of the defendants to the female defendant.

An exception *à la forme* was pleaded by the latter on the ground that her name is Henriette Renault Blanchard, and not Henriette Raineauld as described in the writ.

PER CURIAM. The deed which is sought to be set aside was signed by the defendant as Henriette Raineauld. It is an authentic deed. She cannot complain if she is sued under the name she has taken herself in the deed impugned.

Exception dismissed with costs.

L. E. Panneton, for plaintiff.

Bélanger & Vanasse, for defendants.

H. B. Brown, counsel for defendants

SUPERIOR COURT.

SHERBROOKE, March 31, 1883.

Before BROOKS, J.

HUDON *et al.* v. RAINEAULD *et al.*

Exception à la forme—Cancellation of stamps on writ—Hour of service.

To an action to set aside a deed of sale by one of the defendants to his brother, an exception *à la forme* was filed on the ground: 1. That the stamps on the writ were not properly cancelled; 2. That the hour of service was stated by the bailiff to be between two and three of the clock in the afternoon, no precise hour being given.

PER CURIAM. The cancellation of stamps is a matter that interests the Government only. An attorney who has filed his writ with the necessary stamps on it, is not responsible for the irregularity of the Prothonotary in not cancelling the stamps as required by law. The Prothonotary is merely a revenue officer. He collects his fees in stamps, and he owes an account to no one but the Government. The Act 31 Vic., cap. 2, (Quebec) confines the nullity to the want of stamps, not to the want of cancellation. The hour stated is sufficient.

Exception dismissed with costs.

L. E. Panneton, for plaintiffs.

Bélanger & Vanasse, for defendants.

H. B. Brown, counsel for defendants.

SUPERIOR COURT.

MONTREAL, Sept. 5, 1882.

Before JETTÉ, J.

NEWTON v. CRUSE.

Hypothec—Donation.

1. *Where the holder of an hypothecated immoveable is personally liable for the debt, it is no bar to a direct action against the debtor that the creditor has previously obtained a judgment en déclaration d'hypothèque, under which the debtor has abandoned the immoveable; even though the property has not been discussed.*
2. *A donation inter vivos of a sum of money for valuable consideration secured by hypothec, though payable only after the death of the donor, is not invalid as made causa mortis.*
3. *The creditor can recover by direct action the costs incurred in the hypothecary action as well as his debt.*

The defendant was sued as the universal legatee of the late Isaac Newton, for the amount of a donation made by the latter in payment of services rendered and money advanced by his son (the plaintiff); the amount being payable only after the death of the donor and secured by hypothec upon an immovable.

The plaintiff had previously obtained a judgment against the defendant *en déclaration d'hypothèque*, and the defendant had made an abandonment of the immovable; which, however, had not been sold or discussed. The motives of the judgment which follow, fully explain the contentions of the parties, and the grounds taken by the court.

"Considérant que le demandeur réclame de la défenderesse, en sa qualité de légataire universelle de feu Isaac Newton, son mari, et père du demandeur, la somme de mille piastres, dont ce dernier lui a fait don par acte entre vifs, en date du onze d'avril 1868, devant Lewis, notaire, en reconnaissance de services rendus et de sommes avancées et fournies par le demandeur à son dit père, la dite somme stipulée payable au décès seulement du donateur, mais assurée par une hypothèque constituée par le dit acte sur un immeuble appartenant au dit donateur; au paiement de laquelle somme la défenderesse est obligée personnellement à raison de son acceptation du legs universel à elle fait par le dit Newton, père;

"Considérant que le demandeur allègue, de plus, que le 15 de septembre 1881, il a institué contre la défenderesse, détentrice de l'immeuble hypothéqué à sa créance par le dit acte de donation, une action hypothécaire sur laquelle jugement a été rendu; mais que la défenderesse a refusé de délaisser le dit immeuble, et que les frais encourus sur cette action s'élèvent à \$48.80, qu'il est bien fondé à recouvrer aussi de la défenderesse;

"Considérant que la défenderesse a plaidé à cette action par cinq exceptions, disant en substance;

1o. "Que sur l'action hypothécaire sus-mentionnée, le demandeur a obtenu contre la défenderesse une condamnation personnelle, et qu'il ne peut obtenir un nouveau jugement pour la même créance;

2o. "Que par l'action hypothécaire intentée contre elle par le demandeur, la défenderesse avait droit d'opter entre le paiement de la

somme et le délaissement de l'immeuble; que le jugement sur cette demande ne lui a pas été signifié; qu'elle a par suite encore le droit d'opter, et qu'on ne peut lui demander la somme sans alternative du délaissement;

3. "Qu'ayant, par le jugement rendu sur l'action hypothécaire, le droit d'opter entre le paiement et le délaissement, la dite défenderesse a délaissé, qu'elle a ainsi satisfait au dit jugement, et que le demandeur n'est plus en droit de lui rien demander;

4o. "Que la défenderesse ayant délaissé l'immeuble hypothéqué, le demandeur devait le faire vendre avant de rien réclamer d'elle, la dite défenderesse ne pouvant être responsable que pour la balance restant due après la vente de l'immeuble; et que cette balance n'étant pas établie la demande est mal fondée.

5o. "Enfin, qu'il est faux que le demandeur ait rendu aucun service à son père, et que la donation invoquée était purement gratuite; que de plus il résulte du caractère de la disposition contenue au dit acte que c'est une donation à cause de mort, que cette donation n'est pas valable comme testament, et qu'elle n'est pas non plus faite par contrat de mariage, et que par suite elle est radicalement nulle et de nul effet;

"Considérant qu'il résulte des pièces produites et de la preuve;

1o. Que le demandeur, sur l'action hypothécaire par lui intentée n'a pas obtenu de condamnation personnelle principale contre la défenderesse, mais une simple condamnation ordinaire au délaissement, avec faculté de payer pour l'éviter;

2o. Que la défenderesse a en effet délaissé en justice l'immeuble hypothéqué;

3o. Que le demandeur avait réellement rendu à son père des services considérables et en argent par son travail, justifiant la donation à lui consentie comme paiement de tels services;

"Considérant en droit, que l'effet de l'action hypothécaire n'est en principe, que de forcer le détenteur de l'immeuble hypothéqué à le délaisser; et que le paiement de la dette n'est de sa part que *in facultate solutionis*, mais sans que sa responsabilité personnelle soit engagée; et que le jugement allégué dans l'espèce et rendu sur la première demande du demandeur contre la défenderesse n'a pas une portée plus considérable, que lorsque le détenteur de l'immeuble

hypothéqué est en même temps personnellement obligée au paiement de la dette hypothécaire, le délaissement par lui fait ne peut avoir pour résultat de le libérer et d'empêcher tout recours personnel contre lui ;

"Que dans l'espèce la défenderesse est légataire universelle de son mari, et comme telle, débitrice personnelle de la somme réclamée par le demandeur, et qu'en conséquence la demande hypothécaire antérieurement formée contre elle et le délaissement par elle fait, ne peuvent faire obstacle à l'exercice du recours purement personnel adopté par le demandeur au moyen de sa présente demande ;

"Que le créancier qui a un droit personnel et hypothécaire tout à la fois, ne saurait être forcé de s'en tenir au recours hypothécaire et de l'épuiser avant de pouvoir exercer son recours personnel ;

"Considérant en outre que la donation invoquée dans l'espèce a tous les caractères essentiels d'une donation entre vifs, attendu qu'elle a eu pour effet de dépouiller le donateur immédiatement et irrévocablement de la somme donnée, et de faire dès lors acquérir au demandeur la propriété de cette somme, laquelle étant assurée par hypothèque a été dès ce moment, à la disposition immédiate du demandeur qui aurait pu la vendre ou transporter et, par suite, la réaliser sans délai ;

"Que le terme de paiement fixé par le dit acte, savoir l'époque du décès du donateur, n'a pas changé la nature de la disposition qui portant sur bien présent et actuel dont le demandeur se dépouillait immédiatement et irrévocablement, est resté, malgré ce terme, un acte entre vifs parfaitement légal et valable ;

"Considérant en conséquence que les moyens invoqués par la défenderesse sont mal fondés et ne sauraient être accueillis à l'encontre de la demande."

Renvoie les exceptions et défenses de la dite défenderesse et condamne cette dernière à payer au demandeur la dite somme de \$1048.80.

Abbott, Tait & Abbotts, for Plaintiff.

Doherty & Doherty, for Defendant.

SUPERIOR COURT.

MONTREAL, March 9, 1883.

Before TASCHEREAU, J.

HUDON et al. v. PAINCHAUD et al., es qual. and LA BANQUE JACQUES-CARTIER et al., T.S., TRUDEL, petitioner, and PERKINS es qual., plaintiff par reprise d'instance, contestant.

Succession—Universal legatee.

A universal donee or legatee in usufruct, who has intermeddled with the property of an estate and

succession, who has been sued as such jointly with the testamentary executors of such estate, and against whom judgment was rendered in such capacity, becomes personally responsible for the debts of the estate and cannot under the law as it existed before the code, liberate himself by offering to render an account.

The plaintiff *par reprise d'instance*, as representing a creditor of the estate of David Laurent, obtained judgment against the executors and the universal usufructuary donee (the petitioner) in such capacity. After judgment rendered and upon the execution, the defendant, petitioner, pretended by opposition and contestation of the seizures by garnishment, that by the law in existence previous to the code, she could not be held to satisfy upon her personal property the amount of the judgment, but only upon the property of the estate. Judgment was rendered rejecting this pretention of the defendant and maintaining her responsibility towards the creditor who had obtained the condemnation against her; such judgment being confirmed in appeal. After the judgment by the court of appeal and upon the proceedings on execution of such judgment against the defendant in her quality of usufructary donee, she produced an account establishing that she had absorbed all the property to her transferred in usufruct to pay the debts of the estate, which were all satisfied with the exception of plaintiff's claim, and by a petition in the form of an opposition to judgment, she prays, considering the production of the account and the offer by her made to transfer what remains in her hands of the property of the estate, that she be liberated personally from the payment of plaintiff's claim.

The plaintiff by *reprise d'instance* maintained that after having disposed of the property of the estate and assumed the quality of universal usufructuary donee, and after having allowed judgment to be rendered against her without invoking the privilege which might be granted her under the law anterior to the code, not to be responsible beyond the benefit she derived from the estate as usufructuary donee, and offering an account only after twenty years' enjoyment of the property without having claimed the benefit of such privilege, she was ill founded in her pretensions.

The judgment was as follows:—

"The Court, having heard the petitioner,

dame Anathalie Trudel, and the plaintiff *par reprise d'instance*, Arthur M. Perkins *ex qualif.*, by their respective attorneys on the merits of the petition by which dame Anathalie Trudel prayed that, considering the account rendered and filed by her before this Court, on the 20th April, 1881, the said petitioner be relieved of all responsibility to satisfy out of her personal property the amount of the judgment rendered in this case, and that *mainlevée* of the seizure by garnishment after judgment now pending be granted to her so far as her personal property is therein concerned, and upon the merits of the contestation of said petition by the plaintiff *par reprise d'instance*; having, moreover, examined the procedure, the evidence, the admissions and consents, the exhibits filed, and generally all the papers forming part of the record in this cause, and having maturely deliberated;

"Considering that if the petitioner, by surrendering the property transferred to her or by rendering an account to the creditors, had the right either to be completely discharged of the debt for which she was sued as universal donee in usufruct of her late husband, or to have the amount of the judgment reduced in proportion to the benefit she derived from the estate, she should have taken advantage of that right in the suit originally brought against her, which she has then failed to do;

"Considering that the petitioner has been condemned jointly with the executors of her said husband to pay the debt then claimed by the plaintiff and that such condemnation became direct, *pure et simple*, and personal against the petitioner, and can and must be executed on all her personal property;

"Considering that far from having surrendered the property or having rendered an account thereof in due time, the petitioner accepted unconditionally the universal grant in usufruct made to her; took possession of the whole of said property; gave acquittance and discharge to the executors; answered the actions taken against her in her quality of universal usufructuary donee; was condemned as such; satisfied in part such condemnation; administered to this day the whole of the said property and sold a part of it; enjoyed the revenues of the said usufruct, and paid (as she herself declares) all the debts except the one due to the plaintiff *par reprise d'instance*; and that, after having

administered and enjoyed the said property during nearly twenty years without any possible interference or control on the part of the creditors, she cannot to-day offer to render an account to the plaintiff *par reprise d'instance* to establish an alleged deficiency and be discharged of a personal condemnation which is no longer revocable, and in which she acquiesced by not invoking in due time the privileges and rights to which she is no longer intitled;

"Doth maintain the answers and exceptions of the plaintiff *par reprise d'instance*, and doth dismiss and reject the petition of the said dame Anathalie Trudel with costs against her."

Tailon & Nantel, for petitioner.

Laflamme & Co., for plaintiff *par reprise* contesting.

CIRCUIT COURT.

MONTREAL, March 22, 1883.

Before TORRANCE, J.

THERIEN V. MORRICE *et al.*

Negligence—Damages.

Where a collision occurred between two vehicles, and both drivers were in fault, but it appeared that the accident nevertheless might have been averted by ordinary care on the part of one, who did not stop when requested, the latter was held liable in mitigated damages.

This was an action of damages arising out of a collision between the cart of plaintiff and the waggon of defendants, by which the horse and cart of plaintiff were thrown down an embankment at Hochelaga Railway Station. The cart and waggon were both loaded. The cart was drawn by one horse, loaded with wood and driven by a boy of 17, for plaintiff, and the waggon was drawn by two horses, driven by the servant of defendants. The cart was coming out of the railway station and the waggon was going in the opposite direction. The road where they met led from the station to St. Mary street. It was 35 to 40 feet wide, and on one side was a declivity, down which the horse and cart were precipitated.

Several witnesses were examined. Louis George Filiatrault, the first examined, was the guardian at the station, and saw the most of the accident. He was 200 yards off. Both vehicles were on the wrong side—on their left. Afterwards (he says) it was the fault of the waggon. The right wheel of the cart and the right wheel

of the waggon struck. If the waggon had stopped it would have prevented the accident. Cross-examined, the witness said that he did not see the collision at the moment of collision. It was 13 feet from the point of collision to the slope. It was easy to stop the waggon. Cantin, the lad in charge of plaintiff's cart, said that in consequence of a mound or prominence in the road, when he was at his right—the proper side—he was obliged to go to the left. The waggon was in the middle, and he crossed in front of the waggon, which turned to his left. He called to defendants' man to wait. The front wheel of the waggon, the right one, struck his cart and dragged him 12 feet. Alexandre Lamoureux gave evidence to the same effect.

For the defence, Alphonse deRepentigny, defendants' driver, was produced. He says that Cantin's cart passed in front of him, and he told him he had no business to cross. He added, "I could not move more to the right; takes 45 feet to turn my waggon; axle turns 3 feet." In cross-examination he says, "I could have stopped my waggon when he cried out."

PER CURIAM. Undoubtedly there was fault on both sides, or they would not have struck their right wheels. For the law of the road requires each man to take his right, and then the collision could not have taken place. If the plaintiff had waited till defendant passed, in place of crossing over because of the mound in front, the accident would not have happened. Is defendants' man, afterwards, so much to blame that they should pay? *Vide* 2 Sourdât, responsabilité, No. 662. "Lorsqu'il y a une faute à la fois de la part de l'auteur du dommage et de la partie lésée, la question de responsabilité est abandonnée au pouvoir discrétionnaire des tribunaux. C'est à eux d'examiner si la faute imputable à la partie lésée est seulement de nature à atténuer la responsabilité de l'agent, ou si elle est assez grave pour rendre la partie lésée complètement irrecevable à se plaindre du dommage éprouvé." Campbell, in his "Law of Negligence," says, sec. 83: "To make contributory negligence a defence, it must be the proximate cause, or at least such as to constitute (conjointly with the other) a proximate cause. If, therefore, a person, by some negligence of his own, has placed himself in the way of danger by collision with another, so that he himself becomes unable to avert the

danger, but yet the other by the use of ordinary care may avert the danger, the latter will be liable if damage occurs." See also 5 Legal News, 404, *Desroches et al. & Gauthier*, and 3 Q. B. R., 1. Here it appears to the Court that the defendants' man by the use of ordinary care could have averted the danger. The defendants are therefore liable for the default of their driver, but the man of the plaintiff violated the rule of the road and the plaintiff should therefore suffer too reduced damages for a portion of his loss. Judgment for \$50 and costs.

CONTEMPT OF COURT.

It seems to be a law of legal history that at irregular intervals there should occur periods in which cases of contempt of court are plentiful. One such period occurred in the middle of the last century, and another at the beginning of the present; a third came ten years ago, and we are now in the middle of a fourth. If proof of the last assertion were needed, it would be found in the bill which the Lord Chancellor has deemed it advisable to introduce—a bill whose cause is to be found in the very dissimilar cases of *Mr. Green* and *Mr. Gray*, and perhaps in the proceedings which are now impending over the *Times* and the *Observer*. In introducing a sketch, necessarily scanty, of the law upon this matter, by distinguishing the different kinds of contempt, we are following the method of the Lord Chancellor. Contempts are of two kinds—ecclesiastical and civil. Ecclesiastical contempts are punishable by the writ *de contumace capiendo*, which is issued upon the presiding judge's signification of the contempt to the Sovereign in Chancery; and acts of contempt against superior courts, other than ecclesiastical, are, as is notorious, punished summarily by commitment to prison at the discretion of the court. Acts of contempt again, whether ecclesiastical or no, are susceptible of a threefold division into open contumacy in the face of the court, refusal to submit to the commands of the court, and all action tending to prejudice the course of proceedings before the court. Contempts of the last class were frequently brought into notice about ten years ago, not only in relation to the celebrated Tichborne trial, but also in the case of the Swansea and Cheltenham

ham Railway Carriage and Wagon Company; and the *Times* suggests that the doctrine which holds comment upon legal proceedings which are going on before a court to be what it calls "a sort of constructive contempt of court" is of very recent origin. It even commits itself to the statement that "the Tichborne trial was the first great instance in which the rule in question was enforced." The observation is decidedly incorrect. In 1742 Lord Chancellor Hardwicke, in the case of *Roach v. Garvan*, 2 Atk. 469, cited the case of a certain Captain Perry, who was committed to the Fleet for contempt in printing his brief before his cause was tried, in which it was specially added that the contempt consisted "in prejudicing the world with regard to the merits of his cause before it was heard;" and, twelve years later, the same Chancellor committed one Mrs. Farley (2 Ves. sen. 520) for publishing in the *Bristol Journal* an answer put in by a defendant in chancery, and gave the same reason for his action. It is true that in *Ex parte Jones*, in 1806, Lord Chancellor Erskine did not express his approval, neither on the other hand did he express his definite disapproval of that doctrine of constructive contempt which is undoubtedly still an established principle of the English law.

Turning to the present Lord Chancellor's bill, we find that it has two definite objects. In the first place it purposes to define and limit the punishment which shall be imposed for contempt of court in ordinary cases. This may not at first sight appear a necessary precaution, since there are very few persons who will venture, to assert, after reading the cases, that offenders have been, either as a general rule or in exceptional cases, punished for this offence with undue severity. In almost every case in which the person imprisoned has shown a desire to purge his contempt, and such purgation has been possible, he has immediately been released. To cases in which purgation is impossible, as, for instance, those of particular offences against wards in chancery, neither the foregoing observations nor the present bill are applied. They are applied only to ordinary acts of contempt, and our criticism upon this first part of the bill is that, except in providing for appeals under certain circumstances, it is not directed to the removal of any present grievance, but provides reasonable rules in the event of a

possible miscarriage of justice. But the bill has what we might almost term a second chapter, which provides for a special class of cases. We are now familiar with the spectacle of an ecclesiastical offender who would rather be imprisoned for the term of his natural life than purge his contempt. Such cases have been deplorably common of late years. For them the Lord Chancellor suggests a most wise treatment. The third section provides that, in cases of continued and repeated contempt, the punishment shall also be continued and repeated, and the person offending shall be liable to be again imprisoned by summary order as often as he repeats the offence. But this might not be enough to deter the more obstinate class of ecclesiastical offenders; it is therefore proposed in section 16 that where the holder of any office within the meaning of the act disobeys the order of a court of competent jurisdiction as to any matter concerning the duties of such office, it shall be lawful for the court to limit a time within which he must submit. If the offender then continues in contempt, the court will be empowered to declare his office vacant, "as if he were dead." This section will be a death-blow to those ecclesiastical martyrs whose practice it is to continue in contempt and defy the court, since by its enactment they will be left without any ground to stand upon. It will also be something of a consolation to the general public to learn that, as regards persons who may be imprisoned for contempt at the time of the commencement of its operation, the Act is intended to be retrospective. On the whole, therefore, this is a measure of the most practical nature, admirably calculated to meet a class of cases which have hitherto presented the appearance of an insoluble problem.—*London Law Times*.

GENERAL NOTES.

Judge Phillips of the Macoupin (Ill.) Circuit Court, has rendered a decision which will be of decided interest to bank directors and officials. Stated briefly, the decision holds that a director of a bank is not an ornamental figurehead, but that it is his duty to keep posted as to the condition of the institution with which he is connected. In the case at bar a depositor in an insolvent bank sued the directors personally and recovered a verdict. The insolvency of the bank was caused by the fact that its cashier stole the funds, and the court held that it was the business of the directors to ascertain the true condition of the bank, and that they could not plead ignorance when due diligence would have discovered the facts.—*Chicago Legal News*.

The Legal News.

VOL. VI. APRIL 14, 1883. No. 15.

GRANT v. BEAUDRY.

Our readers will probably have come to the conclusion that this case has received sufficient attention, and we have no disposition to occupy further space with it. We notice, however, in the *Low Times* a temperate article—in refreshing contrast to the frothiness of its local contemporary—in which the editor seems to think that the explanation of the difference of opinion between our Court of Queen's Bench and Mr. Justice Gwynne is very simple. We quote the words of our esteemed contemporary:—

"We think a calm consideration of the whole affair will disclose a reason for the expression of opinion in the Court below, and a reason for the expression used by Mr. Justice Gwynne in the Supreme Court. 'R' very clearly shows [6 Leg. N. 41] that the system of jurisprudence which obtains in Quebec permits the Court to express its opinion upon all the issues in a suit before the Court. On the other hand, it is just as clear that the system of jurisprudence which we enjoy in the Province from which Mr. Justice Gwynne comes, does not permit of this—that is to say, the utterance of the Court on a matter not necessary for the decision of the Court is uncalled for and is not authoritative. We may say it is unwarranted and extra-judicial."

Now, even admitting that our contemporary is strictly correct as to the system which prevails in Ontario, it is obvious that the above is about as severe a criticism of the learned Justice of the Supreme Court as anything which has yet appeared on the subject. Is it possible to imagine a Supreme Court working satisfactorily, if the judges of the Court are so wedded to their own local systems that they will undertake to censure a provincial Court for obeying the law as it exists in the Province for which the Court is constituted?

MR. LANDRY'S BILL.

It is probably cases like the above which have moved Mr. Landry to introduce a bill "to restrict the appellate jurisdiction" of the Supreme Court. The measure provides that the appellate jurisdiction of the Supreme Court shall be abolished in all cases "where the matter in dispute relates to property and civil rights in any of the Provinces, and generally as to mat-

ters of a merely local or private nature and coming within the exclusive jurisdiction of the Legislature of any of the said Provinces, according to the meaning of the British North America Act of 1867 and Acts amending the same." The Act is not to apply to cases decided by the Exchequer Court of Canada, nor to cases where the matter in dispute affects the constitutionality or validity of any Act or Statute of any of the said Provincial Legislatures, which cases shall continue to be subject to appeal to the Supreme Court. At the advanced stage of the session at which it was introduced the Bill will hardly come up for consideration by Parliament during the present year.

THE DEATH PENALTY.

Lord Justice Stephen is a man of considerable vigour of mind; but his intelligence is apt to degenerate into what has recently been frequently termed "crankiness." His views as to the extension of the death penalty tend in that direction. The reason why the death penalty should be maintained in political offences of the graver sort is, certainly, to some extent, to teach people "that to attack the existing state of society is equivalent to risking their own lives," but it is also because it is difficult to know what else to do with political offenders except to execute them. The moral turpitude of political offences is very various. A man of the highest honour, cultivation and rectitude, may be, strictly speaking, a political criminal, and although a government is obliged to protect itself and its subjects against his enterprises, it would shock our ideas of decency to send him for life to pick oakum, or manufacture shoes in a blue and yellow garb of coarse freize. We therefore kill him, with great regret, as we slay the enemy we don't despise in battle. Again, there is a true idea in the *lex talionis*, but it is not the idea of revenge. It is that the penalty should bear some relation to the crime for which it is inflicted. Life for life, an eye for an eye, and a tooth for a tooth, strikes the imagination of the intending criminal, and warns him in his instant of power to be merciful. Thus flogging has been found to be a useful punishment for deeds of violence of an ignominious character. Possibly a punishment involving restitution would check crimes of fraud and theft.

Indignation at crime is a wholesome feeling, but the desire for revenge is a savage instinct, by no means always united to indignation; nay, more frequently disconnected from it. Before being able to make Sir James Stephen understand what is meant by the doctrine, that human life is sacred, it would be necessary to get him to admit the generally received doctrine that man has a soul, and that by destroying human life we are precipitating matters about which we know very little indeed. The Lord Justice confesses plaintively that his views are unpopular and peculiar, and perhaps we may be permitted to rejoice, that views so peculiar are likely to remain unpopular so long as they find no more artful advocate than one who compares the killing of men to the destruction of wolves and tigers, and who naively asks: "What is the use of keeping such a wretch (William Palmer) *at the public expense*, for say half a century?" Imagine how the effect of an execution would be heightened, if it were generally understood that the criminal was being put to death, partly to save his keep!

The death penalty is justified by necessity, precisely as is every other punishment. The right of society to punish depends on two doctrines,—first that it is its duty to provide for its own preservation,—second, that the moral government of the universe, of which the attempts at social order are only imperfect copies, is sanctioned by rewards and punishments. How far shipwrecks and colliery explosions are to be considered as acts of Divine vengeance, I must leave pious old women and Lord Justice Stephen to determine; my metaphysical insight goeth not so far.

R.

OVER LEGISLATION.

In your issue of the 31st of March you quote an article from the *Bystander*, denouncing for its immorality and injustice the dregs of a measure, which, when introduced into Parliament a year ago, we styled the charlatanism of Mr. Charlton. We join the writer in the *Bystander* in the hope that in the real interest of morality, Mr. Charlton's proposal will never become law, and we must add our regret that, owing to some inconceivable weakness, such a bill should ever have passed the ordeal of a second reading. Mr. Charlton's legislative effort is, however, only

an odious form of a growing evil, of popular legislatures—the mania of law-making. Individual capacity is perhaps, in a general way, increased by the spread of education, and the extension of political activity, but it may fairly be questioned whether the available capacity for the framing of laws is at all augmented thereby. There can be no doubt, however, that the pretentious desire to try to make laws is increasing tremendously. As an instance, during the last session of Parliament and this one we have had no end of measures introduced by private members to alter the criminal law. Similar attacks have been made on the civil law in Quebec. What renders all this the more alarming, is the disposition shown by Government to dally with all these schemes. As suggestions they may have their use, but the public should have the skilled authority of Government for or against such laws, and not a mere assent to their passing. It is improbable that a private member can really be possessed of the information necessary to fit him to judge as to the expediency of a fundamental law; and it is certain that very few members are in a position to resist the captivating arguments of an enthusiastic colleague backed by an evil for which he pretends his measure is the cure or a palliative.

Theoretically it is the right of a private member to introduce any bill, except a money bill, but in practice this ought to be restrained to the introduction of private or local acts, or by the leaders of the opposition of bills to test a policy.

The evils of over-legislation have been illustrated by Mr. Herbert Spencer, in a witty essay, in which he says: "On all sides are well meant "measures producing unforeseen mischiefs—a "licensing law that promotes the adulteration "of beer,—a ticket-of-leave system, that encourages men to commit crime; a police regulation that forces street-hucksters into the work-house. And then, in addition to the obvious "and proximate evils, come the remote and less "distinguishable ones, which, could we estimate "their accumulated result, we should probably "find even more serious."

R.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

(In Chambers.)

MONTREAL, April 9, 1883.

Before RAMSAY, J.

Ex parte GRACE HAM, Petitioner for Writ of Habeas Corpus.

Custody of minor—Right of mother.

The mother of a minor of twelve years of age (the father being dead) is entitled to the charge of her child, unless it appears that she is disqualified by misconduct or is unable to provide for the child.

The petition was presented by Grace Ham, widow of the late Abraham Burnet.

RAMSAY, J. On Friday, the 30th March, the petitioner applied for a writ of *habeas corpus* to Martin Phelan, to order him to bring up Emma Burnet, a child of tender years, daughter of the petitioner.

Mr. Phelan obeyed the writ immediately, and stated that the child was not detained against her will; that she had left the house of a Mrs. Dagle, where she had been living, and came to his house for protection, which was afforded her by himself and his wife; that the mother had consented to her daughter remaining with him, and had even in his absence obtained a small sum of money on the pretext of its being part of the child's wages, to which Mr. Phelan said she was not entitled, as he had taken her very badly clothed and had supplied her with all necessary clothing.

The mother in her affidavit said that she was a Wesleyan Methodist, and that her late husband, at all events since his marriage, had been a Wesleyan Methodist, and that they were married by a minister of that religion, that the child had been baptized in the Wesleyan Church and had been brought up in that belief, and was a Protestant till she had gone to Mr. Phelan's house. The petitioner also complained that an effort was being made to change the child's religion.

I examined the child apart from her mother and Mr. Phelan, and she told me she was perfectly happy with Mr. Phelan and his wife, that she wished to stay there, that she wished to become a Roman Catholic, and that she was only a little over twelve years of age. She was well clad and looked happy and in good health.

As the affidavits seemed to me insufficient, in not showing that the petitioner, who is a domestic servant, was in a position to provide for her child, and as the mother had already made an arrangement for her child which did not turn out satisfactory, and as the child seemed to be well cared for where she was, by people of great respectability, I adjourned the further hearing of the case until Saturday, in order to enable the petitioner to adduce other evidence of her being in a position to provide for the child's wants, and also in order that the Crown might be heard in the case. On Saturday Mr. Davidson and Mr. Cross resisted the application unless affidavits establishing the willingness and ability of the relations to take charge of the child were filed. Mr. Arthy, in whose service the petitioner is, then came forward and offered to take charge of the child until she could be sent to her relations in Upper Canada, who, it was alleged, were both able and willing to provide for her. I did not deem this sufficient, as it afforded only a temporary refuge for the child, and I further adjourned the case till Monday, the 2nd April, and finally until to-day, in order to afford the petitioner time to produce affidavits in support of her petition.

These affidavits are now before me, and I have to deal with the merits of the application. The husband being dead, it becomes the absolute right of the mother to have the charge of a child of twelve years of age, unless it can be shown that she is unfit for such a trust, by misconduct, or that she is unable from any other circumstance to provide for her child. In either of these cases she forfeits the right, and the claim of any other relative, or even of a stranger, who can offer sufficient guarantees of character and means, will be preferred. In this case there is nothing against Mrs. Burnet's character, and the affidavits now produced show that her relatives are able and willing to provide a home for the child. I must, therefore, order that the mother shall have possession of her child. At the same time it is proper to add that it is not without reluctance I am obliged to remove the child from the protection of Mr. Phelan, who, with his wife, has done a great duty by this little girl, and behaved in a way highly creditable to himself. The religious question does not enter into consideration in this matter,

because the mother, having a right to bring up her child, has a right to decide what religious teaching she shall receive, and the opinions of a girl at the age of twelve are not sufficiently formed to justify a judge in interfering with the natural order in the matter of guardianship. At a more advanced age this would be different.

Petition granted.

McGoun for Petitioner.

Davidson, Q.C., and S. Cross, for the Crown.

COURT OF QUEEN'S BENCH.

[In Chambers.]

MONTREAL, April 2, 1883.

Before RAMSAY, J.

Ex parte CLARA GERVAIS, Petitioner for Writ of Habeas Corpus.

Procedure in criminal cases—Term of imprisonment—32 & 33 Vic., c. 29, s. 91.

The general rule, that the period of imprisonment in pursuance of any sentence commences on and from the day of passing such sentence, does not suffer exception where the defendant is allowed to go at large after sentence without bail; and therefore where a defendant was allowed to go at large until the term of the sentence had expired, her commitment subsequently was held to be illegal.

RAMSAY, J. An application for a writ of habeas corpus was made before me on behalf of one Clara Gervais, convicted before the Recorder for having kept a house of ill-fame within the police limits of the city of Montreal. The conviction took place on the 29th of August, 1882, and the petitioner was condemned to pay \$100 including costs, and furthermore the said petitioner was condemned for her said offence, to be imprisoned in the common gaol of the District for six months. It seems the petitioner paid the fine and was allowed to go at large till the 27th of March last, when the Recorder issued his warrant for her arrest, and ordered her to be committed to gaol for six months.

The principal objection taken to the commitment was that it was issued after the time of imprisonment had expired. After hearing counsel representing the Attorney General, I ordered the writ to issue, and the prisoner being now before me, I think she must be discharged.

The term of the sentence had expired when the prisoner was arrested, for unless its opera-

tion be suspended, owing to some particular reason, as for instance the party convicted being on bail, the punishment dates from the sentence. Our Statute says so distinctly, 32 & 33 Vic., cap. 29, sec. 91.

There was an application in another case, Ex parte *Henault*, but it differs from the case I have just dealt with in this, that the time of the sentence has not expired. This point was not argued, and as the counsel for the Attorney General is not present, I think the case had better be heard to-morrow. The writ can be returned before another judge in Chambers, as I shall not be in town.* I have no hesitation, however, in saying that the suspension of the execution of the sentence, is a great irregularity, and I am disposed to think the commitment for six months from a date subsequent to the sentence is illegal.†

St. Pierre for Petitioner.

S. Cross for the Crown.

COURT OF REVIEW.

MONTREAL, April 7, 1883.

TORRANCE, DOHERTY, JETTÉ, JJ.

WRIGHT V. WRIGHT.

Ownership—Possession in bad faith—Improvements—C.C. 417.

The possessor in bad faith is entitled to set off the cost of necessary improvements against the claim for rents, issues and profits received by him during his possession. As to improvements not necessary, the proprietor has the option of keeping them upon paying the value or of permitting the possessor to remove them, which, however, he may do only where they can be removed without injury to the land.

This was a petitory action to recover two pieces of land. The only question submitted by the parties was as to the rents, issues and profits due the proprietor, and as to the improvements claimed by the defendant in possession. He claimed \$5,000 as their value. It

* The *Henault* case was subsequently heard before Mr. Justice Cross, who held the commitment to be good, at any rate until the term of imprisonment had expired. We shall give a note of the case next week.

† "If a Statute assigns this mode of punishment (imprisonment) in the first instance, it follows immediately upon, and is the legal consequence of the judgment." Paley on Convictions. Of commitment for punishment, etc., Section 4.

appeared in evidence that the land had been occupied by one William Mooney, and his wife Elizabeth Hackett, without title, from February, 1858, to March, 1871, when Mooney died, and during this occupation he built a house valued at \$800; that after his death his widow and minor son, and afterwards her second husband, occupied the land till November, 1871; that at this last mentioned date the defendant came into possession, where he still is. The Superior Court in the Ottawa district gave judgment on the 18th June, condemning the defendant to give up possession, and declaring that the improvements were compensated by the rents, issues and profits.

TORRANCE, J. There is no question here but that the defendant is a possessor in bad faith, and such a possessor cannot claim the fruits, (C.C. 411); and C.C. 412 says that a possessor is in good faith when he possesses in virtue of a title of which the defects are unknown to him. Demolombe (Tom. 9, No. 586) says that a possessor in bad faith is one who knows that the property possessed by him is not his. It was proved in the case that the rents, issues and profits during the defendant's occupation were \$720. Against this amount was set his improvements, valued at \$655, to which by law he was not entitled as in bad faith, leaving a balance against him of \$65. He claimed also the improvements made by Mooney under a transfer in January, 1880, but Mooney had long before abandoned them, and could not now transfer them. Pothier says (No. 350 of *Domaine de Propriété*) that in practice it is left to the prudence of the judge to decide, according to different circumstances, if the proprietor ought to reimburse the possessor in bad faith the useful expenses to the value of the improvement. We see no error in the judgment, and would confirm, with the modification that, under C.C. 417, we allow defendant to remove certain improvements specified in the judgment, unless the plaintiff prefer to pay \$453.07, and keep them. But the defendant may remove them only if he can do so without injury to the land.

Judgment modified.

P. Ayles, for plaintiff.

M. McLeod, for defendant.

SUPERIOR COURT.

MONTREAL, February 28, 1883.

Before RAINVILLE, J.

THIBAUDEAU et al. v. MILLS et al.

Unpaid Vendor—Privilege.

The defendants (unpaid vendors) sold goods to A, delivery whereof was to be made at a future time. By error the goods were delivered before the time agreed upon, but were not mixed with A's stock. Within fifteen days from date of delivery the defendants, with A's consent, took back their goods. A at this time was unable to meet his engagements.

Held, 1. That the return of the goods in unbroken packages was not a payment within the meaning of the Art. 1036, C.C.

2. That the unpaid vendor, under C.C. 1543, is entitled to ask for the dissolution of the sale by reason of non-payment of price, and A, in returning the goods was only fulfilling the obligation imposed on him by law.

3. That Art. 1998 of the Code, which says that in the case of "insolvent" traders (dans les cas de faillite) the privileged rights of the unpaid vendor must be exercised within fifteen days after the sale, has no application now, seeing that the insolvent act has been abolished.

4. That the contract was only completed by delivery, which, in this case, took place within fifteen days prior to the voluntary return of the goods.

The decision is fully explained in the judgment of the Court, which reads as follows:—

"La cour, etc....

"Attendu que les demandeurs allèguent qu'ils sont créanciers de la Société Chaput & Massé, pour une somme de \$4,527.84, étant \$586.02 pour marchandises vendues et livrées, et la balance pour le montant de différentes billets consentis par les dits Chaput & Massé en leur faveur, à Montréal, savoir, 1^o le billet daté le 1^{er} décembre 1881, pour la somme de \$623.39, payable, etc., etc;

"Que la dite Société Chaput & Massé est insolvable et l'était le et avant le 14 avril dernier, jour où elle a fait cession de ses biens, laquelle insolvabilité a rendu exigible la créance des demandeurs;

"Que les défendeurs Mills & Hutchison connaissent l'insolvabilité des dits Chaput & Massé, et que cependant ils ont reçu, le 14 Août dernier, des dits Chaput & Massé, en paiement de leur

réclamation contre eux, des marchandises et effets de commerce pour un montant de \$726.29 ;

" Que la réclamation des dits Mills & Hutchison n'était pas alors échue ;

" Que par cette dation en paiement les dits Chaput & Massé ont augmenté leur insolvabilité, et ce au détriment de leurs créances, et dans le but de les frauder ;

" Et attendu que les dits demandeurs concluent à ce que la dite dation en paiement soit annulée, et les dits Mills & Hutchison condamnés à remettre les dites marchandises parmi les autres biens de la dite Société Chaput & Massé, sinon à en payer la valeur, savoir \$726.29, pour être distribuée aux créanciers de la dite société Chaput & Massé ;

" Attendu que les défendeurs Mills & Hutchison ont plaidé que les dites marchandises, quoique commandées en juin, ne devaient être livrées que plus tard, sur leur ordre et à leur discrétion ; qu'elles ont été livrées par erreur le 31 juillet dernier ; que sur découverte de cette erreur la convention pour la vente des dites marchandises a été résiliée le 14 Août, du consentement des dits Chaput & Massé, lesquels ont remis les dites marchandises aux dits Mills & Hutchison ; que les dites marchandises étaient dans la même condition que lors de leur livraison ; que les dits Chaput & Massé ne les ont pas placées parmi leurs autres marchandises, mais les ont mises à part, dans la cave de leur magasin ;

" Et attendu que les dits défendeurs Mills & Hutchison concluent à ce qu'il soit déclaré que la dite convention pour la vente des dites marchandises a été résiliée légalement, que les dits défendeurs Mills et Hutchison ont été remis légalement en possession de leurs marchandises, et que l'action des demandeurs soit renvoyée ;

" Considérant que la transaction intervenue entre les parties défenderesses Chaput & Massé d'une part et Mills & Hutchison d'autre part, ne constituait pas une vente parfaite, mais plutôt une promesse de vente dont l'exécution était réservée à la discrétion des dits Mills & Hutchison ;

" Considérant que la livraison des dites marchandises a été faite par erreur ;

" Considérant que la résiliation de la dite convention, et que la remise des dites marchandises par les dits Chaput & Massé aux dits Mills & Hutchison ne constituent pas un paiement et en conséquence ne tombent pas sous l'opéra-

tion de l'article 1036 du Code Civil du Bas-Canada, mais constituent l'exercice volontaire entre les parties, du droit de vendeur non payé ;

" Considérant qu'aux termes de l'article 1998 du Code Civil du Bas-Canada, le vendeur d'une chose non payée peut exercer deux privilèges : premièrement celui de revendiquer la chose ; deuxièmement celui d'être préféré sur le prix ;

" Considérant qu'aux termes de l'article 2000 le vendeur non payé, s'il a perdu son droit à la revendication, ou s'il a vendu à terme, conserve son privilège sur le produit de la chose à l'encontre de tous les créanciers, excepté le locateur et le gagiste ;

" Considérant qu'il est prouvé que les marchandises en question, lors de leur remise aux dits Mills & Hutchison, étaient dans le même état que lors de leur livraison, séparées des autres marchandises des dits Chaput & Massé, non entamées et sous cordes, et qu'il n'y a aucun doute sur leur identité ;

" Considérant qu'aux termes de l'article 1543 du Code Civil, le vendeur de meubles a droit à la résolution de la vente pour défaut de paiement du prix tant que la chose vendue reste en la possession de l'acheteur ;

" Considérant que les parties ont sans fraude résilié la dite convention ou vente de consentement mutuel, et que les dits Chaput & Massé ont exécuté à l'avance ce que la loi les aurait obligé de faire, et que les demandeurs ne souffrent aucun préjudice de cette transaction, en autant que le résultat de l'exercice du privilège des dits Mills & Hutchison par un mode ou par un autre aurait été le même ;

" Considérant qu'aux termes de l'article 1998 du Code Civil, le vendeur dans le cas de faillite, ne peut exercer ses privilèges que dans les quinze jours qui suivent la vente ;

" Considérant que la dite disposition ne s'applique qu'aux cas de faillite et non aux cas d'insolvabilité, et que les dits Chaput & Massé ne sont pas en faillite, en autant qu'il n'existe plus de loi qui puisse permettre de mettre une personne en faillite, et qu'en conséquence le vendeur non payé est toujours à temps d'exercer son droit de préférence ;

" Considérant d'ailleurs que la dite transaction et la remise des dites marchandises ont eu lieu dans les quinze jours de la vente et livraison ;

" Maintient le plaidoyer des dits défendeurs

Mills & Hutchison, et déboute les demandeurs de leur action avec dépens."

Action dismissed.

Mercier, Beausoleil & Martineau, for plaintiffs.

Abbott, Tait & Abbotts, for defendants Mills & Hutchison.

N.B. The case is now in appeal. With reference to the expression "dans les cas de faillite" used in C.C. 1998, see C.C. 17, par. 23: "La faillite est l'état d'un commerçant qui a cessé ses paiements."

CIRCUIT COURT.

MONTREAL, March 20, 1883.

Before LORANGER, J.

THE CORPORATION OF THE COUNTY OF HOCHELAGA
v. THE CORPORATION OF THE VILLAGE OF COTE
ST. ANTOINE.

Corporation—Assessment—Tax to cover expenses of corporation of county.

The Corporation of the County of Hochelaga, being compelled to provide for the payment of certain costs incurred in suits to which the Corporation was a party, adopted a resolution imposing a tax on the several municipalities within the County, in proportion to the assessed value of their real property, in order to cover the debt.

To an action against the defendant, one of the municipalities so charged with a portion of the debt, it was pleaded that a tax cannot be imposed by the county council otherwise than by by-law, and that the attempt of the plaintiff corporation to impose such tax by resolution was illegal.

The Court maintained the defence.

Action dismissed.

C. A. Vilbon, for plaintiff.

Dunlop & Lyman, for defendant.

OFFENCES AGAINST THE STATE.

The Bill introduced by the Minister of Justice provides:—

1. Any person or persons who shall in any manner or form whatsoever administer or cause to be administered, or aid or assist or who is present at and consenting to the administration or taking of any oaths, obligations or engagements, purporting or intending to bind the person taking the same to commit any treason or murder or any felony or misdemeanor, or to engage in any sedi-

tious, rebellious or treasonable purpose, or to disturb the public peace, or to be of any association, society or confederacy formed for any such purpose, or not to inform or give evidence against any associate, confederate or other person or not to reveal or discover any illegal act, done or to be done, or not to reveal or discover any illegal oath, obligation or engagement which may have been administered or tendered to or taken by such person or persons or to or by any other person or persons or the import of any such oath, obligation or engagement, and every person who shall take any such oath, obligation or engagement, not being compelled thereto, shall be guilty of a felony, and shall be liable to be imprisoned in the penitentiary for any term not exceeding five years and not less than two years, with or without hard labor and with or without solitary confinement.

2. Compulsion shall not justify or excuse any person taking such oath, obligation or engagement, unless he or she shall, within eight days after the taking thereof, if not prevented by actual force or sickness, and then within eight days after the hindrance produced by such force or sickness shall cease, declare the same, together with the whole of what he or she shall know touching the same, and the person or persons by whom and in whose presence, and when and where such oath, obligation or engagement was administered or taken, by information on oath before one of Her Majesty's Justices of the Peace.

3. Persons aiding and assisting at, or present and consenting to the administering or taking of any such oath, obligation or engagement as aforesaid, and persons causing any such oath obligation or engagement to be administered or taken, though not present at the taking or administering thereof, shall be deemed principal offenders, and shall be tried as such, although the person or persons who actually administered such oath, obligation or engagement, if any such there shall be, shall not have been tried or convicted.

4. The indictment need not set out the words of the oath.

5. Any engagement or obligation whatever in the nature of an oath shall be deemed an oath, within the intent and meaning of this Act, in whatever form or manner the same shall be administered or taken, and whether the same

shall be actually administered by any person for persons or taken without any administration thereof by any person or persons.

6. That from and after the passing of this Act all and every society or association, the members of which shall be admitted to take any unlawful oath, obligation or engagement within the intent and meaning of the foregoing provisions, and every society or association, the members whereof or any of them shall take or in any manner bind themselves by any such oath, obligation or engagement, or in consequence of being members of such society or association, and every society or association of which the names of the members, or any of them, shall be kept secret, from the society at large, or which shall have any committee or secret body so chosen or appointed that the members constituting the same shall not be known by the society at large to be members of such committee or select body, or which shall have any president, treasurer, secretary, delegate or other officer, so chosen or appointed that the election or appointment of such persons to such office shall not be known to the society at large, or of which the names of all the persons and of the committee or select bodies of members, and of all presidents, treasurers, secretaries, delegates and other officers, shall not be entered in a book or books for that purpose, and to be open to the inspection of all the members of such society or association, shall be deemed and taken to be unlawful combinations and confederacies, and every person who, from and after the passing of this Act, shall become a member of any such society or association, or shall afterwards act as a member thereof, and every person who after the passing of this Act shall, directly or indirectly, maintain correspondence or intercourse with any such society or association, or with any division, branch, committee or other select body, treasurer, secretary, delegate or other officer or member of such society or association as such, or who shall by contributions of money or otherwise aid, abet, or support such society or any members or officers thereof as such, shall be deemed guilty of an unlawful combination or confederacy.

7. Any person who, at any time after the passing of this Act, shall, in breach of the provisions thereof, be guilty of any such unlawful combination or confederacy as in this Act is described, shall be guilty of a misdemeanor, and

shall be liable to be imprisoned in the penitentiary for any term not exceeding three years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labor, and with or without solitary confinement.

8. If any person shall knowingly permit any meeting of any society or association hereby declared to be an unlawful combination or confederacy, or of any division, branch or committee of such society, to be held in his or her house, apartment, barn, out-house, or other building, such person shall, for the first offence, forfeit a sum not exceeding two hundred dollars, and for any subsequent offence shall be deemed guilty of an unlawful combination and confederacy in breach of this Act, and shall be punished as hereby directed.

GENERAL NOTES.

From a return it appears that the expenditure in connection with the consolidation of the Dominion Statutes, including the salary of Hon. J. Cockburn, from the first of July, 1881, to the 30th of June, 1882, has been \$5,085 and for 1882-3, to January 31st, \$2,962.

The annual general meeting of the Law Society was held yesterday at the Secretary's office, Langley street, the Attorney-General in the chair. The Secretary's and Treasurer's reports were received and adopted. The following officers were elected for the ensuing year:—Treasurer, Mr. J. R. Hett (re-elected); Secretary, Mr. Walls (re-elected); Benchers, Messrs. Drake, Edwin Johnson, Hett, McElmen and Pollard.—*Victoria, (B. C.) Standard*, March 28.

Another illustration of the tendency to over-legislation referred to elsewhere, is afforded by the recent recommendation of a committee of the N. Y. Legislative Assembly that "Any person who shall sell, loan, or give to any minor under sixteen years of age, any dime novel or book of fiction, without first obtaining the written consent of the parent or guardian of such minor, shall be deemed guilty of a misdemeanor punishable by imprisonment or by a fine not to exceed fifty dollars." So a bookseller might be sent to gaol by some Dogberry for selling a boy a copy of Gulliver's Travels, Robinson Crusoe, Jack the Giant Killer, or even of the Pilgrim's Progress.

The Marquis of Lorne was gazetted Governor-General of Canada on the 14th October, 1878, consequently the gubernatorial term, which is for six years, although by many it is wrongly placed at five years, will not be completed until October, 1884. Colonial governors invariably hold office during the pleasure of the Crown, but their period of service in a colony is usually limited to six years from the assumption of their duties therein, although, at the discretion of the Crown, a governor may be re-appointed for a further term. The rule limiting the term of service to six years was first made applicable to all British colonies in May, 1828, by Colonial Secretary Huskisson. Canadian Governors, since Confederation, with the terms through which they have served, are as follows:—Lord Monck, from 1st July, 1867, until November, 1868; Lord Lisgar, from November 1868, until May, 1872; Lord Dufferin, from May, 1872, until November, 1878. Lord Dufferin, after having served his full term of six years, was asked and consented to continue in office for a few months, until his successor was appointed.—*Gazette*.

The Legal News.

VOL. VI. APRIL 21, 1883. No. 16.

LORD COLERIDGE'S VISIT.

The promised visit of Lord Chief Justice Coleridge to America during the latter part of the summer is likely to be an event of considerable interest. Lord Coleridge was invited by the Bar Association of New York State to deliver an address before the Association, and his Lordship has promised to come if the state of his health will permit him to do so. In his letter of acceptance his Lordship says:

"I acknowledge in the invitation a striking mark of the kindly feeling entertained by the lawyers of a great American State towards the lawyers in England, engaged as we are in the common practice of a common profession, and bound by a law in many respects the same.

"It is matter of regret to me that the distinction you confer and the kindness you offer should be conferred and offered in regard of one who unaffectedly feels his entire unfitness to represent the great traditions of a body, of which he chances to be the highest non-political member; but as I cannot look upon the compliment as personal, so neither ought personal considerations to influence me in accepting or declining it. I do not feel free to refuse an invitation so cordial and generous as yours, and I accordingly accept it and thank you for it."

The Chief Justice adds that his public duties make it impossible for him to leave England before the 10th or 12th of August, and further, that he has not regained his health and strength since an illness with which he was visited in November last, and therefore it is possible he may be unable from want of strength to undertake the visit.

JUDICIAL WORK.

Some of our contemporaries are interested in the discovery of the Court which can get through its work with the greatest expedition. The *Alabama Law Journal* holds up the Supreme Court of Alabama as a bright example. This Court, composed of three judges, without the aid of stenographers (the Chief Justice only having a secretary), has decided over 800 cases during

the past two years (1881 and 1882), nearly 500 of which were decided in 1882, writing opinions in all except a dozen or less. The Court commenced the present year completely up with its work. The *Alabama Law Journal* asks whether there is any other Court in America that has excelled this? It must be admitted that the record is a very fair one, but the *Albany Law Journal* is informed that a Court of that State (New York) has a better showing. The Supreme Court of N. Y. State, in the Fourth Judicial Department, in the two years 1878-9, decided 909 cases, and wrote opinions in at least five-sixths of them, and in 1880-1 the same Court decided 919 cases, and wrote opinions in at least three-fourths of them. The Court was composed of three judges, without a secretary, and only one of them had a stenographer, and he for a few weeks only. By the census of 1880, the population of the Fourth Judicial Department exceeded that of the State of Alabama by more than 200,000. We think, however, the record of the N. Y. Court of Appeals for 1880 is more wonderful than either of the above examples. The latter Court in 1880 decided 583 of the 608 causes on the calendar, and heard every cause ready for argument (4 L. N. 1).

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

[In Chambers.]

MONTREAL, April 10, 1883.

Before CROSS, J.

In re ANGÈLE HÉNAULT, Petitioner for Writ of Habeas Corpus.

Criminal Procedure—Term of the sentence.

The petitioner was sentenced by the Recorder on the 12th October, 1882, to a fine of \$100, and six months' imprisonment, for having kept a house of prostitution. The fine was at once paid, but the prisoner was allowed to be at liberty until the 28th March, 1883, fourteen days before the expiry of the period of six months. She was then arrested and imprisoned on a warrant from the Recorder ordering her detention under the sentence of the 12th October, 1882, for six months from the date of the warrant. The prisoner applied for release on a *habeas corpus* under section 91 of 32-33 Vic.,

cap. 29, which states that the period of imprisonment in pursuance of any sentence shall commence on and from the day of passing such sentence.

St. Pierre, for Petitioner, urged that as the warrant covered a period extending beyond the original six months it was bad *in toto*, the sentence being indivisible.

S. Cross, for the Crown, urged that in any case the commitment was good for the rest of the original period of six months, and that the petitioner could not be prejudiced by the refusal of a *habeas corpus* at the present time, as she could again apply when the six months had expired.

CROSS, J., without going further into the merits of the case, held that under 32-33 Vic., cap. 31, sec. 71, as amended by 33 Vic., cap. 27, sec. 2, the commitment was good at any rate for the balance of the original period of six months from the date of the sentence.

The petitioner, afterwards, on the 12th April, when the six months had expired, applied for and obtained her release (before MONK, J.) under sec. 91 of the 32-33 Vic., cap. 29.

St. Pierre, for petitioner.

S. Cross, for the Crown.

COURT OF RE VIEW.

MONTREAL, February 28, 1883.

SICOTTE, J., TORRANCE, J., RAINVILLE, J.

FRANCIS et al. es qual. v. BOUSQUET et al.

Husband and wife—Liability of wife.

By a contract of marriage the intending husband made a donation to his intended wife of the usufruct of certain immovable property. The donation was made on the condition that she should pay to his vendors the amount of a mortgage representing a portion of the price of the property, and if the intending husband died without paying another mortgage of \$2,000 created by him upon the said property and his succession was insufficient to pay it, the wife was also to pay whatever balance might be required, but she should be entitled to be reimbursed by his heirs, upon the expiration of the usufruct, for all sums paid. The wife took possession of the property after her marriage, and borrowed money thereon with the authority of her husband, with which the mortgages above mentioned were paid

off. Held, that the wife was personally liable for the amount so borrowed, although in the deed of obligation and mortgage given therefore she and her husband and the curator to the substitution created under the marriage contract, were all described as the "party of the first part," and the money was acknowledged to have been received and was promised to be repaid by the "party of the first part," and the mortgage securing payment was by the same party, and although the husband was described as acting in his own name, and to authorize his wife,—it being proved to the satisfaction of the Court that the money borrowed was applied to the discharge of the mortgages. The fact that the husband's vendors acknowledged, by the same deed of obligation, that they received the amount due them from the "party of the first part," and that the other hypothecary creditor by a separate deed acknowledged to have received his debt from the husband, and that there was no subrogation by either of these creditors in favor of the wife, was held not to affect the wife's personal responsibility, seeing that the evidence established that these creditors were really paid by the money so borrowed.

Abbott, Tait & Abbotts for plaintiffs.

Roy & Boutillier for defendants.

SUPERIOR COURT.

MONTREAL, March 7, 1883.

Before LORANGER, J.

BROWN v. MAGOR.

Procedure—Delay—Foreclosure.

The action was returned on the 16th of February. The defendant appeared on the 17th. On the 26th (the 25th being Sunday), plea was demanded, and on the 2nd March the defendant was foreclosed, and the plaintiff inscribed for *enquête ex parte*.

The defendant now moved to have the foreclosure and inscription removed, and that he be allowed to file his plea (produced with his motion). He submitted that the plea had been demanded before the expiration of the eight days from day of appearance.

The Court set aside the foreclosure and inscription, and allowed the plea to be filed, with costs against the plaintiff.

Cressé & Cressé for plaintiff.

L. N. Benjamin for defendant.

COUR SUPÉRIEURE.

MONTREAL, Fév. 28, 1883.

Coram MATHIEU, J.

LANOINETTE v. TOUGAS, BOURDEAU, intervenant,
et LANOINETTE, contestant.

Cession de biens.

*Un négociant en l'absence d'une loi de banqueroute
peut sous le droit commun faire cession de ses
biens à l'un ou à plusieurs de ses créanciers
pour le bénéfice général de tous.*

*Le créancier qui a reçu telle cession peut disposer
de l'actif à lui cédé, et à moins que fraude ne
soit prouvée, les actes du cessionnaire seront
maintenus.*

PER CURIAM. D'après le droit civil, à Rome, avant la loi Pauliana, toutes les aliénations, quoique frauduleuses, étaient valables et demeuraient telles. La loi "Celia Sentia" avait déclaré nuls les affranchissements d'esclaves qui étaient faits en fraude des créanciers.

La loi "Pauliana" ne fut pas aussi énergique que la loi "Celia Sentia," qui, déclarant l'affranchissement nul, n'avait pas à établir une action pour le faire révoquer. La loi "Pauliana" ne déclare pas nulles les aliénations frauduleuses, mais elle permet aux créanciers d'en obtenir la révocation. L'article 1032 C. C. ne donne que le même droit aux créanciers. Il ne prononce pas la nullité absolue. Le débiteur peut gouverner librement son patrimoine, vendre, acheter, emprunter, donner même, et dans tous ses actes, il représente ses créanciers, à condition cependant qu'il exerce son droit de bonne foi, car la bonne foi est la condition sous laquelle toutes les conventions sont faites et qui doit présider à tous les actes de la vie civile (25 Demolombe, No. 146). Il faut la preuve de la fraude, car il y a d'un côté le débiteur "propriétaire" qui a droit de gérer son patrimoine, et de l'autre le créancier qu'il faut protéger contre la fraude (Rome, de l'action Paulienne, p. 143).

Le débiteur conserve la libre administration de son patrimoine; il peut donc aliéner son bien, mais le législateur n'a pas voulu laisser le créancier désarmé en présence d'un acte frauduleux (Idem, p. 149.)

La condition essentielle d'application de l'action Paulienne est la fraude, mais c'est là une condition composée qui comprend le "consilium

fraudis et eventus damni" (Rome, de l'action Paulienne, p. 29).

Règle générale, l'action Paulienne n'est admise que lorsque le débiteur, par l'acte dont le créancier se plaint, s'est rendu insolvable, ou du moins a diminué son patrimoine.

Ainsi je considère que les biens du défendeur n'ont pas été vendus pour un prix aussi élevé qu'ils auraient réalisé dans une vente par autorité de justice, alors je devrais décider, et je décide, qu'il y a lieu à "l'action Paulienne."

Il pourrait se faire cependant qu'il y eût lieu à l'action Paulienne, sans que l'acte dont le créancier se plaint ait eu pour effet de diminuer le patrimoine du débiteur; et Demolombe, tome 25, No. 167, en cite un exemple :

"Remarquons enfin qu'il se pourrait que l'action Paulienne fut admissible contre un acte par lequel le débiteur n'aurait en réalité, ni diminué son patrimoine, ni négligé de l'augmenter; néanmoins cet acte avait été fait en fraude des créanciers, c'est-à-dire qu'il avait eu pour but et pour résultat de porter atteinte, d'une manière quelconque, au droit de gage qui leur appartient sur tous les biens de leur débiteur (Comp. Supra, No. 153). Car notre règle est que tous les actes, quels qu'ils soient, qui ont été faits en fraude des créanciers, sont soumis à l'action Paulienne.

Voilà un exemple, un débiteur qui a vendu l'un de ses immeubles à son juste prix, il est vrai, mais dans le but de soustraire ce prix aux poursuites de ses créanciers, de complicité avec l'acquéreur. Une telle vente pourrait-elle être attaquée comme frauduleuse ?

Assurément oui ! (Comp. Proudhon, t. V, No. 2362; Zachariae, Aubry et Rau, t. III, p. 89, 90.)"

Il n'y a rien de tel dans la cause actuelle, et quoiqu'il eût été plus prudent de la part des cessionnaires Lamarche et Deschamp d'offrir au demandeur sa part des biens du défendeur, telle que réalisée, cependant rien ne fait soupçonner que cette part ne soit pas à leur disposition; et dans tous les cas, il n'est pas prouvé que le défendeur ait vendu ses biens dans le but d'en soustraire le prix aux poursuites de ses créanciers.

La preuve démontre, au contraire, que son intention est d'en distribuer le prix à ses créanciers.

Dans la cause de *Calvin et al. v. Tranchemontagne et al. et Thomas et al.*, opposants, Cour Su-

périeure, Montréal, 21 mars 1870, Torrance juge, rapportée à la page 210 du 14ème volume du Jurist, il a été jugé qu'une cession des biens d'un débiteur insolvable à des syndics, faite sans se conformant aux dispositions de l'acte de faillite alors en force, était frauduleuse.

Cependant, dans cette cause, la Cour n'a pas décidé la question de savoir si la cession devait être annulée en vertu des dispositions de l'article 1032, C. C.; mais elle a décidé qu'une cession de cette nature était déclarée frauduleuse par la sous-section 1ère de la section 3 de l'acte de faillite de 1864.

Je ne crois pas que cette cause fasse autorité sur la question qui nous occupe, et elle ne décide pas du tout cette question au point de vue des principes du droit civil, mais c'est un jugement basé sur les dispositions de l'acte de faillite de 1864.

Dans la cause de *Sharing*, appellant, et *Meunier dit Lapierre et al.*, intimés, jugée par la Cour d'Appel, à Montréal, le 12 mars 1857, rapportée à la page 25 du 7ème volume des décisions des tribunaux du Bas Canada, Lafontaine, juge en chef, Aylwin, J., Duval, J. et Caron, J., le jugement de la Cour inférieure avait maintenu l'opposition parceque le demandeur contestant n'avait pas prouvé la fraude.

Voici les termes de ce jugement: "Considérant que le dit *Sharing* n'a pas prouvé que la transaction faite le 14 août 1855, entre les opposants et madame Elizabeth Cloutier, avec le consentement de ses créanciers, à l'exception du dit *Sharing*, était un acte illégal en lui-même ou prohibé par la loi, ou que l'autre acte de même date a été exécuté en fraude de ses droits comme créancier, mais qu'au contraire, cet acte de même date a été passé de bonne foi, à la connaissance et du consentement de tous les créanciers, à l'exception du dit *Sharing*, quoiqu'il ne fût pas partie au dit acte, en a cependant connaissance, et que les effets saisis formaient partie du fonds de magasin cédé aux dits opposants, et qui étaient au temps de la saisie en leur possession comme propriétaires, renvoie la contestation," etc.

Ce jugement avait été rendu par le juge Smith, et il fut confirmé par la Cour d'appel. Les juges étaient également divisés, Duval et Caron étant en faveur de le confirmer, et Lafontaine et Aylwin voulant le renverser.

Dans la cause de *Cumming et al.*, appelants,

et *Smith et al.*, intimés, décidée par la Cour d'appel, à Montréal, le 6 décembre 1860, sir L. H. Lafontaine, juge en chef, Aylwin, J., Duval, J., Meredith, J. et C. Mondelet, J., et rapportée à la page 122 du 10ème volume des décisions des tribunaux du Bas Canada, il a été décidé qu'un créancier ne peut être tenu de se soumettre aux conditions d'un acte d'attribution fait entre son débiteur, et la majorité des créanciers de ce dernier, et que tous les biens d'un débiteur insolvable deviennent et sont le gage commun des créanciers, et qu'ils ne peuvent être soustraits au contrôle d'un chacun d'eux par les actes du débiteur, et que tout transport fait par le débiteur insolvable de ses biens, pour les soustraire à l'action de ses créanciers ou d'aucun d'eux, est absolument nul d'après les dispositions de l'édit de Henri IV de mai 1609.

Il est vrai que dans cette cause, la Cour dans son jugement, déclare absolument nul un acte fait par un débiteur, en fraude de ses créanciers. Cette décision semble aller plus loin que l'article 1032 de notre Code qui permet seulement aux créanciers de faire annuler cet acte.

Les faits dans la cause de *Cumming et al.*, et *Smith et al.*, sont bien différents de ceux qui ont été prouvés dans cette cause.

Dans la cause de *Cumming*, le défendeur avait failli en 1853 et avait alors composé avec ses créanciers, promettant de leur payer soixante et quinze centins dans la piastre, payable dans quinze mois, c'est-à-dire cinq centins par mois. Il avait effectué huit de ses paiements, savoir: quarante centins sur cette composition, lorsqu'en 1855, il faillit de nouveau et fit à Smith et al. une cession de tous ses biens en date du 4 octobre 1855.

Le prix qui fut désigné comme devant être payé par les cessionnaires était fixé à la somme de £2,181 16s. payable à diverses échéances par des billets à ordre, consentis par les opposants et par eux délivrés au défendeur.

Ces billets représentaient le chiffre de la composition que le défendeur avait offerte à ses créanciers et que plusieurs de ceux-ci avaient acceptée, tandis que d'autres, du nombre desquels étaient les demandeurs, l'avaient refusée. Cette composition n'était pas la même pour tous les créanciers. On avait fait une distinction entre les nouveaux créanciers, c'est-à-dire ceux dont les créances étaient postérieures à la première faillite et les créanciers anciens, c'est-à-dire

ceux dont les créances étaient antérieures à cette première faillite.

Aux premiers, la nouvelle composition avait pour effet d'abord d'offrir 8 cts. par louis et 4 cts. par louis sur la balance de leur créance, déduction faite de ces 8 cts. Mais aux créanciers anciens 4 cts. par louis sur la balance de leur créance, telle que réduite par le paiement des 8 cts. qu'ils avaient reçus en vertu de la première composition arrêtée lors de la faillite de 1853. Les billets à ordre ainsi signés des opposants ne devaient être livrés à l'une et à l'autre classe des créanciers qu'en autant que ceux-ci acceptaient la seconde composition et donneraient quittance au défendeur.

Ils ne devaient pas profiter à ceux qui s'y refusaient. Ce sont les faits tels que rapportés dans cette cause par le juge en chef Lafontaine, à la page 131 du 10ème volume des Décisions des Tribunaux du Bas Canada.

Comme on le voit, on faisait là une distinction entre les créanciers que la loi ne justifie pas et on obligeait les créanciers à donner quittance à leur débiteur, sans avoir reçu le montant de leur créance.

Dans la cause qui nous occupe, il est prouvé que le fonds du magasin a été vendu à sa valeur, et que les créanciers ont le droit de partager également dans le prix, et qu'ils ne sont pas tenus de donner quittance à leur débiteur.

Dans la cause de *Cumming & Smith*, le juge en chef Meredith faisait partie du tribunal et il était dissident.

Voici les remarques qu'il fait à la page 125 :

"Je ne puis concourir dans la proposition soumise à l'argument de cette cause, que du moment qu'un homme est insolvable, il cesse d'être le propriétaire de ses biens, ou dans la position qu'un commerçant notoirement insolvable ne peut disposer de son fonds de commerce, sans le consentement de tous ses créanciers ; j'admets que les biens d'un débiteur sont le gage de ses créanciers, mais qu'il puisse être le gage de ses créanciers, il reste cependant la propriété du débiteur qui a non seulement le droit, mais aussi le devoir de l'exploiter, autant que possible, pour l'acquit de ses dettes. Notre loi ne pourvoit pas à l'administration des biens des commerçants insolubles, et quiconque a eu l'occasion de réfléchir sur le sujet s'est convaincu que l'insolvabilité non seulement n'est pas une raison pour suspendre l'administration des biens d'un marchand, mais souvent une raison, justifiant une plus grande activité dans

l'administration. Comme les biens d'un failli doivent être administrés et que la loi n'a pas prévu à l'administration autrement que par le propriétaire, il s'en suit que le propriétaire a le droit de les administrer tant qu'ils sont en sa possession, et si dans le cours de cette administration il devient nécessaire pour le débiteur de disposer même de tout son fonds de commerce, je considère qu'il a le pouvoir de le faire, sans que le consentement de tous les créanciers soit nécessaire, parce que le débiteur, dans ce cas, n'est pas seulement l'administrateur mais le véritable propriétaire des biens et le recours des créanciers. Mais s'il peut être prouvé qu'une telle vente tend à frustrer ou à diminuer ou même retarder le paiement des justes réclamations des créanciers du débiteur ou d'aucun d'eux, ou à donner à quelques-uns des créanciers une préférence induue sur les autres, elle peut être annulée."

Dans cette cause de *Cumming & Smith*, il me semble que la cour, en déclarant que la vente faite par un débiteur insolvable à un créancier qui connaît cette insolvabilité est absolument nulle, a imposé un principe que la doctrine et la jurisprudence ne justifient pas, mais quant à la décision de la cause elle-même, l'injustice faite à certains créanciers était tellement évidente, qu'il est impossible de ne pas approuver la décision qui a annulé l'acte de cession.

Je dois remarquer de plus que dans la cause de *Cumming*, il n'y avait pas eu de livraison, ni réelle, ni même feinte ou symbolique, des effets qu'on prétendait avoir été vendus, et le juge en chef déclare que pour lui il est satisfait que la preuve a constaté que les effets étaient toujours restés la propriété et en possession du défendeur, tandis que dans la cause qui nous occupe, il y a eu livraison des effets que pour la prise de possession de l'intervenant. Car pour qu'il y ait livraison, il n'est pas toujours nécessaire qu'il y ait déplacement :

"Effectivement, disent Delamare et Poitevin, Traité de la Commission No. 231, le magasin du vendeur étant devenu le magasin de l'acheteur, dans quel but celui-là enlèverait-il la chose." Voyez aussi 16 Toullier, vente No. 248, 1^{er} volume de la continuation par Duvergier et Pothier, "Traité de la propriété, No. 199."

Ces autorités sont citées dans le rapport de la cause de *Cumming & Smith*.

L'Edit de Henri IV du mois de mai 1609 ne fait que déclarer nuls et de nul effet et valeur, les transports et cessions de leurs biens, faits par les banqueroutiers à leurs enfants héritiers, ou autres, leurs amis, afin de les leur conserver.

Voici les termes de cet Edit : "Et néanmoins, parce que le plus souvent les dits banqueroutiers font faillite dans l'intention d'enrichir leurs enfants et héritiers et pour couvrir plus aisément leur desseins malicieux, font transport et cession de leurs biens à leur dits enfants, héritiers ou autres, leurs amis, afin de les leur conserver, nous

avons par ce même moyen déclaré et déclarons tels transports, cessions, venditions et donations de biens-meubles et immeubles faits en fraude des créanciers, directement ou indirectement, nuls et de nul effet et valeur ; faisant défenses à tous nos juges d'y avoir égard, au contraire, s'il leur appert que les dits transports, cessions, donations et ventes soient faites et acceptées en fraude des dits créanciers ; Voulons les cessionnaires, donateurs et acquéreurs être punis comme complices des dites fraudes et banqueroutes." Je ne crois pas que la nullité décrétée par cet édit, puisse couvrir le cas qui nous occupe. Cet édit est intitulé : "Edit contre les banqueroutiers frauduleux qui déclarent nulles les ventes faites par eux."

Le défendeur est-il un banqueroutier dans le sens donné par cet Edit ?

Dans la cause de *Nithall*, demandeur en Cour inférieure, appelant, et *Young et al.*, défendeurs en Cour inférieure, et *Michon et al.*, intervenants en Cour inférieure, intimés, jugée par la Cour d'appel à Québec, le 16 décembre 1859, Lafontaine, juge en chef, Aylwin, J., Duval, J., Meredith, J., Mondelet, J., et rapportée à la page 149 du 10ème volume des décisions des tribunaux du Bas-Canada, il a été décidé qu'un débiteur insolvable ne peut ni céder, ni transporter son fonds de commerce à deux de ses créanciers en fidei-commis, pour l'avantage de tous tels créanciers, sans leur consentement et que lorsqu'un tel transport est fait, sans le consentement de tous les créanciers et que les cessionnaires, ayant obtenu du débiteur, le cédant, la clef du magasin, mettent ce magasin sous clef et annoncent les marchandises en vente par encan pour l'avantage des créanciers généralement, aucun des créanciers qui n'aura pas consenti au transport pourra, non-obstant icelui, saisir les effets comme étant encore en la possession du débiteur saisi, en autant qu'il n'y a pas eu de cession légale ou livraison suffisante, pour transporter la propriété ou la possession aux cessionnaires.

Dans cette cause, la Cour a encore affirmé qu'une cession de cette nature était absolument nulle. Le juge en chef Meredith a différé, parce qu'il prétendait que cette cession n'était pas frauduleuse. Je crois encore remarquer que dans cette cause de *Withall* il n'y avait pas eu de vente par les fidei-commissaires, comme cela a eu lieu dans cette cause actuelle.

Je crois qu'on peut soutenir avec raison que tant que les fidei-commissaires sont en possession des effets, ils ne doivent être considérés que comme les mandataires du débiteur et qu'ils ne possèdent les effets, qu'en vertu d'une autorisation de les vendre. La propriété ne reste pas en suspens et ces effets n'appartiennent pas aux fidei-commissaires, ils doivent appartenir au débiteur.

Dans cette cause de *Young*, l'acte de composition obligeait les créanciers à donner quittance et il était même stipulé, que s'ils n'acceptaient pas l'acte de composition dans l'espace de quatre-vingt-dix jours, il opérerait comme une décharge

complète du débiteur. Il n'y a rien de tel dans la cause qui nous occupe, et tout ce que la Cour a à décider est de savoir si un débiteur qui vend son fonds de commerce et le livre à un tiers pour un prix qui en représente la valeur réelle, qu'il met à la disposition de ces créanciers, fait un acte nul ou si cet acte n'est qu'annulable, si l'on prouve la fraude de la part du débiteur et de l'acheteur et un préjudice réel causé aux créanciers.

Voici ce que nous lisons dans *Demolombe*, volume 25, No. 175 : "D'après l'article 1167, les créanciers peuvent attaquer les actes de leur débiteur pour cause de fraude ; d'où il semblerait résulter que le texte n'exige qu'une seule condition : la fraude ! Mais ce premier aperçu serait très inexact ; et en décomposant le mot fraude, on y trouve, au contraire, d'après son acception juridique, la nécessité de deux éléments distincts, à savoir : un fait et une intention : " *Fraudis interpretatio semper injure civili non ex eventu duntaxat, sed ex consilio quoque desideratur*," disait Papinien (L. 79, ff de Reg. Jur. ajout Inst. Qui et ex quib. causis manum, §3.)

C'est-à-dire que deux conditions principales sont requises pour que les créanciers puissent attaquer, en leur nom personnel, les actes faits par leur débiteur : "1° Il faut que ces actes leur aient causé un préjudice. 2° Il faut qu'ils aient été faits en connaissance de cause par le débiteur, sachant qu'il cause ce préjudice à ses créanciers.

L'eventus damni, d'une part ; et d'autre part, le *consilium fraudis*.

La première condition est exigée dans tous les cas ; la seconde comporte des distinctions que nous aurons à présenter bientôt."

C'est aussi ce qu'exige l'article 1032 de notre Code : "Un contrat ne peut être annulé, à moins qu'il ne soit fait par le débiteur, avec l'intention de frauder et qu'il n'ait l'effet de nuire aux créanciers."

Dans cette cause, la preuve constate qu'il n'y a pas eu chez le défendeur l'intention de frauder ses créanciers, mais qu'au contraire la cession qu'il a faite, a été faite pour le bénéfice de ses créanciers et à leur avantage, et je suis aussi satisfait par la preuve qui a été faite, que cette cession n'a pas eu l'effet de nuire aux créanciers, mais qu'au contraire, qu'elle leur a été avantageuse.

En conséquence l'intervention est maintenue avec dépens.

Prévost & Turgeon, avocats pour les créanciers et l'intervenant.

Loranger & Beaudin, avocats pour Lanouette.

FEDERAL AND LOCAL JURISDICTION.

An important discussion took place in the House of Commons, on the 9th instant, on a motion for the third reading of a bill to grant certain powers to the Acadia Powder Company. The Company, which is incorporated under a local act of Nova Scotia, came to the Parlia-

ment of Canada to get extended powers. We give some extracts from the debate as reported in the *Hanard* :—

"Mr. *Quimet*. From the reading of our Constitutional Act, it is quite clear that corporations created by the Local Legislatures may come here to have their powers extended, that is to say, to have powers granted them which could not be granted by the Local Legislatures, just as, for instance, the *Credit Foncier Franco-Canadien* came here the other day, not to become incorporated, but to ask for some privileges in the matter of interest charges, the Local Legislature having no jurisdiction in that matter. But this case is quite different. From the reading of this Bill I understand that the corporation does not come here to get a new charter, but only to get extended powers. The first clause provides that a certain business may be carried on throughout Canada. No doubt we have power to create corporations whose operations may be extended to the whole of Canada, or, as the Constitutional Act says, whose object is general or federal. The first clause then might be allowed. But the second clause, giving the company power to increase its capital, is, I think, an infringement of the rights of the Province which created this company. The third clause, relating to the Directors being continued in office, is of the same character. This Bill does not make this corporation a federal corporation. It is only a local corporation which comes here for extended powers. I would say, therefore, that this Legislature ought to grant only those powers which the corporation could not obtain from the Provincial Legislature. I think that we ought not to grant to this corporation, which is not a federal corporation, powers which it might obtain from the Local Legislature, and thus deprive the Local Legislature of control over this corporation, which is its creature. If the Bill is amended so as to exclude the last two sections I will support it; if not, I will vote in favor of the motion to reject the Bill.

Mr. *Blake*. The observation of the hon. gentleman is, I think, perfectly just. It is a very grave question, what is the precise line of demarcation in the powers of the local Legislature in reference to the incorporation of companies. My own impression is that we have very largely created a legislative current of opinion which may so far influence judicial decisions as to give an interpretation to the Constitution in favor of Federal powers greater than that which a juster interpretation of it, if applied at an earlier date, would have given. I have not been able myself to apprehend why a trading company, intending to have its seat of business and the carrying on of its operations, so far as manufacture and production is concerned, within one Province, should go beyond Local and come within Federal jurisdiction,

simply because it intended to sell to citizens of other Provinces. I do not think that sufficient reason for making it a Federal corporation; but my hon. friend from Laval has correctly pointed out—whether it be true that the company is about to extend its operations in the way the second clause proposes or no—that clause does, on its face, suggest something which a fairly liberal construction of our powers might place within them. It does not say that the Acadia Powder Company want to sell powder within the limits of Nova Scotia, which, in my opinion, would have been no sufficient reason for Federal action at all, but says the Acadia Powder Company wants power to make powder in other places and different Provinces, and that may be a reason for our acting. There are two modes in which we can deal with a manufacturing or trading company which wants more than a Local Legislature can give. We can either extend to the corporate entity which has been created by the Local Legislature certain powers which we alone can give; or we can create a federal corporation complete and entire, created by ourselves and amenable to ourselves, *totus, teres, atque rotundus*, giving it such powers as we see fit to give. On general principles of these two modes I strongly prefer the second, because the second gives you a multiplicity of conveniences. I would refer all those who are interested, whether as shareholders, creditors or otherwise, in the constitutional powers of the company to the one Statute, or the amendments of that Statute in the records of the Legislature which created it. The other exposes you to complication, of which the observations of my hon. friend as to these subsequent sections afford an instance—complications as to the power of this Legislature to intervene; and upon the whole I think it is too plain to require lengthy argument that a corporate body engaged in trade should owe its birth, origin and powers to some one legislative body to which it is responsible, and to which it can apply for further powers. That does not affect the constitutional powers of this legislature to give an additional power to a corporate entity already erected, not capable of obtaining that additional power from any other body than ourselves; but I perfectly concur in the observations of my hon. friend, that if we adopt the first and least convenient course we ought to know the extent of the corporate entity, the sum of power which it cannot obtain from the Local Legislature, and which will enable it to enlarge, if required, the sphere of its operations; and if we decide that we will give the required additional power, that does not alter in any respect the end of the corporation. That corporation continues to be after this Act what it was made before—owing its birth, corporate existence, to the Local Legislature which created it; and I do not see how we can, with any degree of propriety, interfere in the other domestic details of that corporation. Why should we en-

large the capital stock of this company, or do the other things here mentioned? It is not proposed we should turn it into a federal corporation; it remains a local corporation. We merely give to this local corporation, created by a Local Legislature, and wanting something that that Legislature has not forbidden it to have, but cannot give it, that which it lacks. There we stop. We leave its whole domestic arrangements where they were. Suppose this company wants something else next Session. Cannot it get it from the Legislature of Nova Scotia? Are some of the domestic arrangements to be altered by the Nova Scotia Legislature and some to be altered here? What inextricable confusion would be created if we adopted this principle. I beg to move that the Bill be not read the third time, but be referred back to the Committee of the Whole for reconsideration.

Mr. McCarthy. I entertain not the slightest doubt that we can give increased powers to an incorporation although it may owe its existence to one of the Provinces, just as we could give increased powers to an American company or an English company. But I think it must rest there. I agree with my hon. friend who has moved the amendment to the amendment, that we ought not to go beyond that, because it is not necessary for us to do so, and it will only create endless confusion. Now, by the second clause of this Bill we are asked to increase the capital stock of this company. The Local Legislature of the Province of Nova Scotia had power to incorporate this company with such capital as that Legislature thought fit; in the same way it has power to increase that capital from time to time upon such terms as the Legislature thinks proper. But it would be difficult to know how the matter should be dealt with if we were going to give them additional power, or were interfering with the organization of the company, which are matters wholly within the jurisdiction of that sovereignty which is creating that corporate right. I shall, therefore, have great pleasure in voting for the amendment to the amendment. I am glad the line has been drawn so clearly and distinctly, because we could not have voted for the original amendment.

Sir John A. Macdonald. This matter has already been referred to in the Railway Committee, but we might also allude to it here. In the Railway Committee we laid down the principle that if the purpose be a Dominion purpose, and any individual can apply to Parliament, surely any local or foreign corporation may apply to Parliament for the purpose of getting powers which we are able to confer upon it. But when a local corporation, for instance, is incorporated by a Provincial Legislature it is the creature of that Legislature, and it is only created as a corporation under certain conditions and provisions; and if those conditions and provisions had not been inserted in the Provincial charter, *non constat* that the Pro-

vincial Legislature would have created the corporation and brought the entity into existence. And, therefore, a complication arises when the local corporation, having certain limited powers conferred on it by a Provincial Legislature, seeks extended powers. While we can give extended powers we cannot alter the constitution of the corporation granted by a Provincial Legislature; nay, I go further and say, that if a corporation, chartered under conditions and provisions by a Provincial Legislature, comes to the Dominion Legislature and asks for increased powers, which the Provincial Legislature says are contrary to their policy, and would thwart their policy, under which, by which, and for which they created it a corporation originally, then I think it is quite within the jurisdiction of the Provincial Legislature to destroy that corporation and to take steps to dissolve it. The company has committed a breach of the ground and of the principle under which it received its charter. Those powers having been granted, so long as the entity exists, they can be exercised by that entity; but any local corporation which comes here for extended powers runs the risk of being destroyed altogether. We will take any Provincial Act—we will not speak of this Act—say the Provincial Insurance Companies' Act. Suppose that company comes here seeking for enlarged powers. The Local Legislature may say: "It is contrary to our policy to have insurance companies taking risks in more than our own Province; we want to have Provincial insurance companies for Provincial purposes, under Provincial charters, so that we may be able to look after the administration of their funds, and we do not desire that they should invest money and take insurance risks all over the Dominion, or in foreign countries." The Provincial Legislature may say that, and if it does, and if we give the company additional powers contrary to the policy of the Local Legislature, that Legislature may say: "This is a breach of the primary condition under which the company's charter was granted, and as we brought the company into existence so we now repeal the Act." If this were done incorporation would cease to exist, and all the extended powers given by the Dominion Parliament would of course expire with the decease, and with the destruction of the Provincial corporation. So that I quite agree with hon. gentlemen opposite, in stating that the most convenient way to obviate the inconvenience already pointed out, is, that when a corporation wishes to extend its powers, obtained from the Provincial Legislature which originally created it, the company should come to this Parliament and obtain a new charter giving it a Dominion instead of a Provincial existence, which existence can be destroyed or hampered at any time by our dealing with the company contrary to the policy of the Provincial Legislature which created it.

Main motion as amended agreed to.

The Legal News.

VOL. VI. APRIL 28, 1883. No. 17.

STAMPS ON PROMISSORY NOTES.

In December last (5 L. N. 425), we noticed a decision *Bradley v. Bradley* by a County Court Judge in Ontario, which held, in effect, that the right which could be exercised formerly in certain cases, of double stamping a promissory note and thereby rendering it valid, had been taken away by the Act abolishing stamp duties (45 Vict., cap. 1). This decision, if it were well founded, appeared to disclose a very unfortunate oversight on the part of the Legislature. We are glad, however, to find that the law is not viewed in this light by a Judge of a Superior Court. In *Dickison v. Normandeau*, which is noted in the present issue, Mr. Justice Taschereau decides that the right to affix the required stamps is not interfered with by 45 Vict., cap. 1. His Honor remarked that even if there had been no reserve in the Act of existing rights, the general principles of our jurisprudence would have guided the Court to the same conclusion; but in the Act in question there is a special reserve of acquired rights in these words: "Provided always, that all Acts or enactments repealed by the said Act shall remain repealed, and that all things lawfully done, and all rights acquired under the said Act or any Act repealed by it, shall remain valid," etc. It is satisfactory to find the judgment of a Superior Court of law coinciding with the equity of the case, and carrying out the obvious intention of the legislature.

THE LATE SIR GEORGE JESSEL.

The late Master of the Rolls has received unusual attention from the press, and the notices of his career have been more than commonly enthusiastic. The reflection suggests itself: if the first judicial appointment from among the Jews has been such an extraordinary success, what may not the country have lost by the omission to make such appointments in the past? The Attorney General declared in the House of Commons: "I believe no Judge ever sat upon the Bench who combined great know-

ledge, ability, mental power, and an earnest desire to administer justice to every suitor to a greater extent than the late Master of the Rolls. Of late years he has been the very centre of the judicial Bench. The public always sought his judgments and were content with them; and although the word irreparable in connection with the loss of any man ought not to be lightly used, yet I am sure this loss to the public service cannot be over-estimated or easily repaired."

The professional journals have been even more eulogistic. The *London Law Journal* says:—

"The performance by Sir George Jessel of his daily work in the now deserted Rolls Court was an exhibition of power seldom witnessed. The lawyer hardly knew which most to admire—his minute knowledge of case-law, the breadth of his acquaintance with legal principles, or the amazing rapidity with which he took in the facts of his cases. Sir George Jessel seemed to devour an affidavit as soon as it was put into his hand. There was a superstition that nature had physically endowed him above other men with the capacity of acquiring knowledge, and that he could read one line with one eye, and the next line with the other. It is certain that hardly any subject came to the surface in his court without his displaying a knowledge of it which astonished experts. Large drafts were made on these gifts in patent cases, and the Master of the Rolls was equally at home in mechanical complications and in chemical mysteries. Something has necessarily been said of his fault of manner on the bench; but it lay merely in the manner. His mind was eminently judicial, and the most skillful advocate that practised before him probably never discovered that he had any prejudices. Least of all had he any favor for those of his own race, although he was the first of his blood who attained the English bench. * * * There was no section of the community which did not look to him for the most uncompromising justice. This was due to the belief, not only that he had a practical knowledge of most of the affairs of life, and was a learned lawyer, but that his mind was absolutely free from cant. His rapidity was so great, and his reputation so high, that the Rolls Court became during his reign the most important

court in the country. When the Judicature Acts came into operation, the universality of Sir George Jessel's legal knowledge stood him in good stead. Here, at least, was one judge who could decide off-hand upon the limitations of a crabbed settlement at one moment, and at another expound the obscurities of a bill of lading. * * * Sir George Jessel was not free from the faults to which great minds like his are liable. He was so quick that occasionally he was hasty, but the mistakes he made were not half so many as those of other judges who got through about a tenth of his work. He was also apt to be intellectually overbearing. He was fond of exposing the errors of others, but he never admitted a doubt of the correctness of his own opinion. His phrase, 'Of course all judges believe that they are right,' has passed into a byword; and Sir George Jessel was the mental antipodes of Lord Eldon, great lawyers as both were, and in some respects not unlike one another. History does not record that Sir George Jessel ever admitted he was wrong. When his attention was called to the fact that the Court of Appeal had overruled his decision, he said: 'That is strange; when I sit with them, they always agree with me.' This was generally true, as there were few judges whom the Master of the Rolls could not carry with him. Whoever sat with him the court was generally considered to consist of the Master of the Rolls."

The *Solicitor's Journal* says: "If uniformity can make a characteristic, the universality of regret which is called forth by the news of Sir George Jessel's death will characterize his life and fame. Nor did the scope, variety, and strength of his gifts fall short of the grief which attends their loss. As a judge he was at once so swift and so sure that the surprise which each quality called forth became nothing less than astonishment at the union of the two. When he reasoned, it seemed as though he could dispense with authority; when he quoted, his learning and research admitted of no comparison. No branch of law seemed unfamiliar to him. Whether he was construing, with vast knowledge guided by lucid common sense, the terms of an intricate will, or laying down the principles of patent law, or expounding mercantile usage, or settling the limits of public authority, or regulating the procedure of

the courts, he was alike clear, practical and profound. Such achievements could only have been possible to a man gifted with the swiftest apprehension and the most ample and tenacious memory. And in truth he seemed only to need to reach his hand in any direction to lay hold upon the keystone which at once fitted and completed the arch of legal reasoning upon any matter which was before him. It was precisely these faculties which enabled him to deal with such extraordinary sagacity with facts however numerous and complicated, and to deliver occasionally those judgments which have been sometimes said to show the highest kind of excellence—judgments in which the statement of the facts gives at once the reasoning and the conclusion."

Equally eulogistic are the writers for the non-professional journals. The *Spectator* says: "Sir George was by common consent the ablest judge on the bench, and the ablest probably in the annals of English history, if, at least, the rapid despatch of business be taken into account, as well as the soundness of the judgments and the breadth of the legal principles embodied in them. * * * A more extraordinary intellectual engine than his brain has not been seen at work in our generation. Great as he was as a pure lawyer, he was still greater in the despatch of business; for the speed, and the marvellous accuracy on the whole with which he worked at so great a speed were certainly neither rivaled nor approached by any contemporary of his own. * * * He had usually mastered the drift of an argument before it was half out of the counsel's mouth, and had taken in the exact drift of a deed before any other man would have got at its general scope and tendency. * * * His appetite for work was something vast. Nothing pleased him better when he came to the end of one heavy task, than at once to undertake another which he might easily have declined. The spectacle of his last struggle with a mortal disease was something more than impressive. For many weeks he discharged every duty, not only in his court, but in relation to volunteer offices, for omitting which he could well have pleaded illness, and this when he was so dangerously ill that to take a step upstairs without assistance was impossible, and when at times it was an effort to him to speak at all."

The *Spectator*, however, does not omit to mention some defects of this highly gifted judge: "Sir George Jessel had not, like the great Jewish contemporary who achieved a still higher fame in politics, any unique insight into other men. He was not skillful in the use of social weapons. He had no great stores of banter or wit at his command. His speeches in Parliament were not of the first order, even for the speeches of a solicitor-general. He was not as persuasive as Sir Henry James, nor anything like as lucid in the exposition of political issues as Sir Farrer Herschel. Marvellous as his powers were, they were probably never shown to less advantage than during his short Parliamentary career. For in the forms of things he was not a master. He was deficient in tact, in the art of literary and popular exposition; and appeals to feelings he either despised or could not understand."

THE AFFIRMATION BILL.

On the 6th April, an influential deputation waited upon the Archbishop of Canterbury, on the subject of the Affirmation Bill. A memorial has been signed by 13,650 of the clergy, setting forth that the deliberate removal of the name of the Almighty from the oath, as proposed by the Parliamentary Oaths Act, 1866, Amendment Bill, was dishonoring to the Almighty, and utterly opposed to the spirit of the Constitution and of the law of England. The deputation represented that the *onus probandi* for any change in the oath lay with those who introduced this Bill. Unless some very much stronger grounds were shown, they thought there was no sufficient reason for any alteration of the Parliamentary Oath in the direction which the Bill proposed. They could not but feel that the recognition of the Supreme Being pervaded the whole of our constitution and laws—in the coronation of our Sovereign, in the public action of the judges of the laud, as well as in the forms of prayer which in both Houses of the Legislature were offered up to the Supreme Being at the commencement of their proceedings. Although it was said that this change was to remove the last religious disability on the entrance of any member into the House of Commons, yet all previous legislation on this subject had been to relieve the conscientious religious scruples, whether of Quakers,

Moravians, or Jews. But in this case the removal of the disability was to meet the case of one who had publicly admitted that he had no such conscientious religious scruples. The Archbishop, in replying, expressed sympathy with the views of the deputation, but remarked that the absence of the formula would not necessarily imply unbelief. Declarations had already in several instances been substituted for oaths. It was by a declaration that a clergyman repudiated the crime of simony, and by a declaration that he declared his assent to the Thirty-nine Articles and to the Book of Common Prayer.

NEW BOOKS.

A HISTORY OF THE CRIMINAL LAW OF ENGLAND, by Sir JAMES FITZJAMES STEPHEN, K.C.S.I., D.C.L., a Judge of the High Court of Justice, Queen's Bench Division. (New York, Macmillan & Co.; Montreal, W. Drysdale & Co.)

Last year we reproduced an article from *Nineteenth Century*, written by Sir James F. Stephen, giving a brief sketch of the history of English Criminal Law. (See 5 L. N., 209, 219, 225.) The learned Judge wrote that paper as an outline of an important work which he was about to produce on the history of the criminal law. That work is now before us, in the form of three considerable volumes. We need not say anything as to the peculiar merits of Mr. Justice Stephen as a legal writer; he is well known to the profession by his *Digest of Criminal Law*, and as one of the principal commissioners appointed to prepare a draft Criminal Code. Of the present work he says:—

"It is longer and more elaborate than I originally meant it to be, but, until I set myself to study the subject as a whole, and from the historical point of view, I had no idea of the way in which it connected itself with all the most interesting parts of our history, and it has been matter of unceasing interest to see how the crude, imperfect definitions of the thirteenth century were gradually moulded into the most complete and comprehensive body of criminal law in the world, and how the clumsy institutions of the thirteenth century gradually grew into a body of courts and a course of procedure which, in an age when everything is changed, have remained substantially unaltered,

and are not alleged to require alteration in their main features. Much has been said and written of late years on the historical method of treating legal and political matters, and it has no doubt thrown great light on the laws and institutions of remote antiquity. Less has been done in investigating comparatively modern laws and institutions. The history of one part of our institutions has, under the name of constitutional history or law, been investigated with admirable skill and profound learning. Comparatively little has been done towards writing the history of other branches of our law which are perhaps more intimately connected with the current business of life. Of these the criminal law is one of the most important and characteristic."

We have already given Mr. Justice Stephen's views on the death penalty (*ante*, p. 104), and we may hereafter, if space permits, print extracts from some other portions of this brilliant work. In the meantime, in order to give a correct idea of the plan of the book, we append the contents:—

- I. Statement of the subject of the work.
- II. Roman Criminal Law.
- III. Early English Criminal Law.
- IV. The ordinary Criminal Courts—Queen's Bench Division of the High Court, the Courts of Assize, the Courts of Quarter Sessions, Courts of Summary Jurisdiction, Franchise Courts, Welsh Courts.
- V. The Criminal Jurisdiction of Parliament and the Court of the Lord High Steward.
- VI. The Criminal Jurisdiction of the Privy Council.
- VII. History of the Law of Criminal Procedure.—Procedure down to committal for trial or bail.
- VIII. History of the Law of Criminal Procedure continued—Forms of Accusation and Trial—Appeals—Ordeals—Trial by Jury.
- IX. History of the Law of Criminal Procedure continued—Legal Incidents of a criminal trial—Indictment and Information—Arraignment, Trial, and Verdict.
- X. History of the Law of Criminal Procedure continued—Proceedings by way of Appeal.
- XI. History of Criminal Trials in England from 1554-1760.
- XII. Description of Modern Criminal Trials.
- XIII. History of Legal Punishments.
- XIV. Management of Prosecutions.
- XV. General and Comparative View of English and French Criminal Procedure.
- XVI. Limits of Criminal Jurisdiction in regard to time, person, and place—Acts of State—Extradition.
- XVII. Of crimes in general and of punishments.
- XVIII. Criminal responsibility.
- XIX. Relation of madness to crime.
- XX. Constitutional elements of the substantive Criminal law, Common law and Statute law; Treason, Felony and Misdemeanour.

XXI. Leading points in the history of the substantive Criminal law.

XXII. Of parties to the commission of crimes, and of incitements, attempts, and conspiracies to commit crimes.

XXIII. Offences against the State—High Treason.

XXIV. Seditious offences—Seditious words—Libels—Conspiracies.

XXV. Offences against religion.

XXVI. History of the law relating to murder and manslaughter.

XXVII. Offences against the person other than homicide.

XXVIII. History of the law relating to theft and similar offences.

XXIX. Coinage offences—Forgery—Malicious Injuries to property.

XXX. Offences relating to trade and labor.

XXXI. Miscellaneous offences.

XXXII. Police offences punishable on summary conviction.

XXXIII. Indian Criminal law.

XXXIV. The codification of the criminal law.

The work concludes with accounts of several trials, viz, The case of John Donellan—William Palmer—William Dove—Thomas Smethurst—The Mouk Léotade—The affair of St. Cyr—The case of François Lesnier. We have no doubt that this important and interesting contribution to legal history will be widely read and appreciated.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, February 24, 1883.

Before MATHIEU, J.

LE PRINCIPAL DE L'ECOLE NORMALE JACQUES-CARTIER V. POISSANT.

Normal School — Pupil — Penalty for refusal to teach.

The father of a pupil of the Jacques-Cartier Normal School will not be liable to repay the amount of a bursary granted to his son, unless it be shown that the son was put in default and refused to teach.

The plaintiff by his declaration represented that the Jacques-Cartier Normal School was established in 1856 by Act of Parliament, and a certain number of bursaries were provided for poor pupils who intended to become teachers; that these bursaries consisted in the sum of \$32 a year, which was deducted from the cost of board; that in 1876 the defendant placed his son Célibert in the school; that this pupil re-

ceived board and education at the school, and on his leaving did not devote himself to teaching. The conclusions were for \$64, for two years' bursary, and \$40, penalty for failure to teach during three years, &c.

The defendant pleaded as to the \$40 penalty and the \$64 for bursaries, that he was not responsible for his son, and that the penalty of \$40 was for *refusal* to teach, which his son had never refused to do; that he was never put in default to teach, and there was no vacant place.

The Court held that the refusal of the pupil to teach must be established, and the action was dismissed, save as to a small sum which the defendant had tendered.

M. Ethier, for the plaintiff.

Mousseau & Co., for the defendant.

SUPERIOR COURT.

MONTREAL, April 21, 1883.

Before TASCHEREAU, J.

LE PRINCIPAL DE L'ÉCOLE NORMALE JACQUES-CARTIER V. PELLAND.

Normal School—Pupil—Refusal to teach.

In order to recover the penalty provided by law, for the refusal of a pupil of the Normal School to teach, his default to teach must be established.

The judgment explains the case:—

"La Cour, etc....

"Considérant que le demandeur réclame du défendeur la somme de \$116.40, comme suit, savoir: 1o. \$18.40 pour balance due sur la pension du fils du défendeur à l'École Normale Jacques-Cartier à Montréal, de 1876 à 1878; 2o. \$56 étant pour un an et trois-quarts de bourse à \$32 par année, que le défendeur serait appelé à rembourser au demandeur, vu que le dit fils du défendeur qui était élève boursier de l'institution n'a pas enseigné à sa sortie d'icelle; 3o. \$40, montant de la pénalité imposée aux élèves sortis de l'institution et n'enseignant pas durant une période d'au moins trois ans; et 4o. \$2 pour location de livres et fournitures faites au dit fils du défendeur pendant sa dite pension;

"Considérant que le défendeur a par ses défenses plaidé prescription de deux ans pour les *items* mentionnés en premier et quatrième lieu, et que quant aux *items* mentionnés en deuxième et troisième lieu, il a allégué n'en être responsable en loi, ne s'étant jamais engagé à les payer, et ces causes de dette étant étrangères à

sa volonté; que d'ailleurs son fils n'avait jamais été requis au désir de la loi d'enseigner après sa sortie de l'école;

"Considérant que la prescription invoquée par le défendeur à l'encontre des dits premier et quatrième *items* est celle qui résulte de l'article 2261 du code civil; que c'est une courte prescription qui a absolument éteint la créance (art. 2267), et que par l'article 2263, elle s'applique tant en ce qui concerne les droits de sa Majesté que ceux de tous autres;

"Considérant que le quatrième *item* est en réalité pour simple *location* de livres et d'autres objets, n'est qu'un accessoire de la dette pour pension et enseignement, ainsi que constaté par la preuve, et doit suivre le sort de la réclamation principale, qui est prescrite;

"Considérant que le fils du défendeur n'a jamais refusé d'enseigner à sa sortie de l'école, et n'a jamais même été mis en demeure de le faire; que le refus d'enseigner, aux termes de la loi et des règlements invoqués par la demande pourrait seul justifier la réclamation faite pour remise de bourse et pour pénalité (2ième et 3ième *items*), laquelle réclamation n'est conséquemment pas admissible dans l'espèce [12 Rév. Lég., p. 177, cause de *Le Principal de l'École Normale Jacques-Cartier v. Laurent Poissant*];

"Considérant qu'en outre cette réclamation ne pourrait être faite contre le défendeur qu'en autant qu'il se serait lui-même engagé spécialement, ce qui n'a pas été prouvé, ou qu'il serait tenu par la loi même de l'acquitter, ce qu'il n'est pas possible de prétendre;

"Maintient la défense et renvoie l'action avec dépens, distracts," etc.

Action dismissed.

M. Ethier, for the plaintiff.

Mercier, Beausoleil & Martineau, for defendant.

SUPERIOR COURT.

MONTREAL, April 21, 1883.

Before TASCHEREAU, J.

FRANCIS V. CLEMENT es qual.

Alimentary allowance—Action by natural child against mother.

A person who has come of age, and who does not show that he is unable, by reason of infirmity or other sufficient cause, to earn his own subsistence,

has no right to an alimentary allowance from his parents, whatever the means of the latter may be.

The plaintiff, describing himself as the natural son of Dame Jane Power, *filie majeure*, an interdict, sued the curator of his mother for an alimentary allowance. He alleged that his mother had considerable means, about \$40,000, with an income of \$3,000 per annum.

The curator pleaded that the plaintiff was 25 years of age, and refused to work for his own support, although quite capable of providing for himself. The mother's fortune was much less than the sum stated, and the income was only \$1,400 per annum. She had legitimate heirs—two sisters, and nephews and nieces.

The Court, by the following judgment, maintained the defence:—

"La Cour, etc.

"Considérant que l'obligation que la loi naturelle et la loi civile imposent aux pères et mères de fournir des aliments à leurs enfants majeurs n'existe que dans le cas où ces derniers sont incapables, pour raison d'infirmités ou par des circonstances indépendantes de leur fait et de leur volonté, de subvenir personnellement à leurs besoins; que quelque soit la position de fortune de ses ascendants, l'enfant majeur, capable d'exercer une profession, métier ou emploi utile quelconque, qui se refuse ou se soustrait au travail et ne justifie d'aucun effort sérieux par lui fait pour se procurer des moyens d'existence, n'est pas en droit d'exiger d'eux des secours alimentaires:—[Pothier, mariage, No. 385; 4 Demolombe, Nos. 46 et 48; Rousseau de Lacombe, vo. Aliments, section 1, et vo. Bâtard, section 3; Dalloz, Recueil périodique, 1862, 2e partie, p. 59; *Idem*, 1863, 1ère partie, page 400];

"Considérant qu'il ressort de la preuve et des documents de la cause que l'état de dénuement dans lequel le demandeur prétend se trouver, a pour cause principale son instabilité, ses habitudes de désordre et d'oisiveté, sa répugnance à s'employer utilement pour lui-même, et même ses refus réitérés de s'adonner au travail lorsqu'on a offert de lui en procurer; qu'il est en âge et en état de se suffire, qu'il possède l'instruction, l'intelligence et la santé requises pour pouvoir exercer un emploi rémunérateur; et considérant que tant qu'il n'aura justifié de ses dispositions sincères pour le travail et des dé-

marches qu'il aura faites pour s'y livrer, le tribunal ne pourra accueillir favorablement sa demande d'une pension alimentaire;

Maintient la défense et renvoie l'action avec dépens, distraits à messieurs Pagnuelo et St. Jean, avocats du défendeur, réservant au demandeur le droit de faire plus tard une nouvelle demande d'aliments, sous d'autres circonstances plus favorables que celles dans lesquelles la présente action a été portée."

Action dismissed.

Geoffrion, Rinfret & Dorion, for the plaintiff.
Pagnuelo & St. Jean, for the defendant.

SUPERIOR COURT.

MONTREAL, April 21, 1883.

Before TASCHEREAU, J.

CARTER v. MOLSON, deft. and oppt., and CARTER contesting.

Seizure of Immoveables—Description.

The description of the immoveables seized given in the minutes of seizure and in the advertisements, should be precise in itself as to what is seized, and it is not sufficient to refer therein to a title deed, and to state that all the right and interest of the defendant in and upon the property under such deed is seized.

The defendant, by an opposition à fin d'annuler, opposed the seizure, on the ground that the description of the thing seized was insufficient. The written judgment of the Court fully explains the nature of the question:—

"La Cour ayant entendu les parties, savoir, le défendeur opposant et le demandeur contestant par leurs procureurs respectifs sur le mérite de l'opposition à fin d'annuler, faite par le dit opposant à la saisie immobilière opérée en cette cause, laquelle opposition est contestée par le demandeur; ayant de plus examiné la procédure et toutes les pièces du dossier, et sur le tout délibéré;

"Considérant que le demandeur a fait saisir sur le défendeur des droits immobiliers d'une nature indéfinie, et que cette saisie est constatée par le procès verbal et les annonces du shérif comme étant de tous les droits et intérêts du défendeur dans et sur la propriété décrite en le dit procès-verbal et en les dites annonces par et en vertu d'un certain acte de vente y mentionné;

"Considérant qu'une saisie immobilière ne

peut être faite que de la propriété même des immeubles ou des droits incorporels auxquels ils sont affectés; que si la saisie porte sur la propriété même, les droits de propriété du saisi, soit au total, soit à une partie divisée ou indivise de l'immeuble, doivent être clairement énoncés dans le procès-verbal et les annonces, et si elle porte sur des droits incorporels, la nature précise de ces droits doit y être indiquée; que faute de ces énonciations essentielles, la désignation des biens saisis est insuffisante, prête à l'incertitude et à la confusion, et est de nature à écarter les adjudicataires et à leur faire craindre des procès futurs;

“Considérant que la désignation insuffisante des droits saisis en cette cause ne peut être complétée par la référence qui y est faite à l'acte de vente dont il y est fait mention, attendu qu'une désignation faite dans un procès-verbal de saisie doit être précise par elle-même quant à ce qui fait réellement l'objet de la saisie, et que dans la désignation en question il est impossible de voir s'il s'agit de la propriété de tout l'immeuble ou d'une partie de l'immeuble, ou d'un démembrement de la propriété ou bien de droits incorporels seulement, et de quels droits incorporels;

“Considérant que pour ces motifs la saisie opérée en cette cause et tous les procédés subséquents à icelle sont en violation des articles 632, 637, 638 et 648 du Code de Procédure, et que l'opposant a intérêt d'invoquer leur nullité;

“Rejette la contestation du demandeur, maintient l'opposition à fin d'annuler du défendeur opposant, déclare la saisie et les annonces faites en cette cause nulles et de nul effet, et donne main-levée de la dite saisie à l'opposant, le tout avec dépens contre le demandeur contestant.”

Opposition maintained.

Barnard, Beauchamp & Creighton, for opposant.
Abbott, Tait & Abbotts, for plaintiff contesting.

SUPERIOR COURT.

MONTREAL, April 26, 1882.

Before TASCHERKAU, J.

MCORCHAN V. THE MONTREAL ABATTOIR COMPANY.

Obligation with a term—Insolvency—C.C. 1092.

Held, that a Company ceasing to meet its ordinary payments as they become due, though its nominal assets may be equal to its liabilities, will be

deemed insolvent; and cannot claim the benefit of the term upon a promissory note not yet due.

This action was instituted on the 17th February, 1882, upon a promissory note dated 1st September, 1881, and payable at six months; due 4th March, 1882. The plaintiff alleged the insolvency of the defendants, and contended that in consequence they could not claim the benefit of the term.

The defendants pleaded, amongst other things, that they were not insolvent at the time of the institution of the suit, and that the action was premature.

It was proved that previous to the institution of the action the Company had failed to meet its payments then coming due; and had been sued by several creditors for large amounts; while others had accepted renewals. That a statement of the Company's affairs had been submitted to its creditors, showing assets to a nominal amount of \$365,000, composed chiefly of real estate, plant and machinery; with liabilities to an amount of \$210,000; in addition to which, however, there was capital stock to the extent of \$150,000.

In the statement of assets were included some items of expenditure for insurance and wages, and also interest, which would go to reduce the amount. At the meeting of creditors when the statement was produced, an extension of time was asked for and granted by the majority. The Company was proved to have been working at a loss since the month of January. But the Secretary swore that the embarrassment was merely temporary, and that in his opinion the Company would in time pay its creditors in full, though the shareholders might lose their investment.

The Court dismissed the plea, and maintained the action with costs, upon the grounds following:—

“Considérant que lorsque la présente action a été portée la Compagnie défenderesse était devenue insolvable ou en faillite, et avait cessé ses paiements, aux termes de l'article 1092 et de paragraphe 23 de l'article 17 du Code Civil, et ne pouvait plus réclamer le bénéfice du terme accordé pour le paiement du dit billet promissoire.”

Judgment for plaintiff.

Abbott, Tait & Abbotts, for plaintiff.

Beique, Choquet & McGoun, for defendants.

SUPERIOR COURT.

MONTREAL, April 21, 1883.

Before TASCHEREAU, J.

DICKISON v. NORMANDEAU.

Promissory Note—Insufficient Stamps—Effect of the Act repealing the Stamp Acts.

The right of the holder in good faith to apply to the Court for leave to affix the required amount of stamps to a note on which suit is pending, is not affected (as to a note made before the repeal of the duty) by the Act 45 Vict., c. 1, repealing the Stamp duties.

The only question of law was whether since the Act 45 Vict., cap. 1, the holder of a note insufficiently stamped, on which suit is pending, has the right (which existed before the repealing Act was passed) of affixing the required stamps, by permission of the Court.

The defendant cited *Bradley v. Bradley* (referred to in 5 Legal News, p. 425), decided by the Judge of the County Court of Victoria County.

The Court did not consider that the decision cited was well founded, and the objection was overruled. The written judgment sufficiently explains the case:—

"La Cour, etc.

"Considérant que le défendeur n'a pas établi en preuve les allégations de sa défense en cette cause, à l'effet qu'il existait une convention entre les parties que le billet promissoire en question en cette cause devait être renouvelé, et que la dette constatée par le dit billet ne devait être réclamée qu'après qu'un certain brevet d'invention exploité par le défendeur serait devenu rémunératif;

"Considérant que le dit défendeur a aussi invoqué par ses défenses le fait que le dit billet promissoire n'était pas suffisamment revêtu de timbres, mais que par jugement interlocutoire de cette cour, il a été permis au demandeur d'apposer sur le dit billet des timbres supplémentaires au montant requis pour le valider, et que telle apposition a eu lieu depuis;

"Considérant que les parties ont depuis admis que le dit jugement interlocutoire n'avait pas été rendu du consentement des parties, ainsi qu'il apparaîtrait avoir été rendu à sa face même; de sorte que le défendeur peut encore faire valoir les raisons qu'il peut invoquer à l'encontre du dit jugement interlocutoire et de la

légalité de l'apposition de timbres supplémentaires;

"Considérant que le Statut 45 Victoria, chap. 1, tout en rappelant l'acte 42 Victoria, chap. 17, a fait la réserve expresse de tous les droits que le dit Acte ainsi appelé donnait aux parties, et qu'au nombre des dits droits était celui que le dit acte appelé accorde au porteur de bonne foi d'un billet promissoire d'y apposer des timbres supplémentaires, s'il en est besoin sur la permission du tribunal, dans une cause pendante au sujet de tel billet promissoire; laquelle réserve de droits est d'ailleurs conforme au droit commun et aux règles d'interprétation applicables à tous les Actes du Parlement;

"Considérant que le demandeur a prouvé qu'il était dans les conditions favorables exigées par l'Acte 42 Victoria, chap. 17, pour pouvoir être admis à faire l'apposition de timbres supplémentaires, et que le défendeur, fauteur du dit billet, en faisant valoir l'insuffisance des timbres par ses défenses, n'a fait qu'invoquer son propre défaut de se conformer à la loi lors de la confection du dit billet;

"Rejette les défenses, maintient le dit jugement interlocutoire, et condamne le défendeur à payer au demandeur la somme de \$200, cour actuel, montant du billet promissoire," etc.

Judgment for the plaintiff.

Dunlop & Lyman, for the plaintiff.

W. S. Walker, for the defendant.

SUPERIOR COURT.

MONTREAL, March 31, 1883.

Before LORANGER, J.

THE CANADA INVESTMENT & AGENCY Co. v. MACPHERSON.

Procedure—Delay.

When the delay to file preliminary pleas, under Art. 107 C.C.P. expires upon a Sunday, Art. 24 C.C.P. is held to apply, and the defendant is allowed to file his preliminary plea on the next following day.

The defendant filed an exception à la forme upon a Monday, which was the fifth day from the return of the writ.

The plaintiffs presented a motion to dismiss the defendant's exception, on the ground that the delay mentioned in Art. 107 C.C.P. was not liable to extension; the four days not being there designated as juridical days.

The Court dismissed the motion with costs.

Abbott, Tait & Abbotts, for plaintiffs.

Paradis & Chassé, for defendant.

(R.T.H.)

The Legal News.

VOL. VI.

MAY 5, 1883.

No. 18.

THE SEDUCTION BILL.

Mr. Charlton's Bill, making seduction a criminal offence, (as well as the Incest Bill,) has been extinguished in the Senate. The Minister of Justice, Sir Alexander Campbell, spoke strongly and decidedly against the measure. In the course of an able argument the Minister referred to communications which he had received "from two of the most eminent judges in Canada who have written voluntarily, without my suggestion, against the legislation contemplated by this Bill." These judicial opinions are important, as it is possible that some ambitious legislator may be anxious to make a fresh attempt at this pernicious and ill-advised species of legislation. One of the learned judges says:—

"I see a bill reported by a select committee, and read a second time, making adultery and seduction criminal offences. I can hardly conceive any more dangerous step that could be taken in the present complicated state of society than to bring such matters within the scope of criminal legislation. It might suit a primitive and simple state of society like that of the old Puritan communities of New England. As an old Judge, alas, of many years' experience in trying civil and criminal cases, I look with undisguised alarm at the probable effects of such legislation on the world as it now is around us; but to my mind the greatest objection to the proposal (as I understand it), it is only a crime for punishment in the man and not in the woman. It is intelligible to declare that such offences are crimes, but it is absurd, to my mind, to declare that the criminality is only with one of the two actors. If it be a sin or a crime, the principals must be equally guilty. It is nonsense to declare that because the consequences—the shame and suffering—fall chiefly on the female the sin or the crime is not equally with her as with him. Such one-sided legislation is an utter confusion of right and wrong, and a burlesque on discriminating justice. I take a strong view, and look upon such one-sided legislation as tampering with immutable principles

of right and wrong. Women should be made to understand that they must guard their own honour and chastity. As the law now is, they are too frequently the seducers and tempters, and then obtain, or their parents for them, damages. Give them the additional terrors of a criminal prosecution and the effect on public morals will be indeed edifying."

The other letter was summarized as follows by Sir Alexander Campbell:—

"The other letter which I have points to a very grave danger which men are exposed to in their intercourse with women of this character, although it is not with reference to actions for seduction. The learned judge refers to a case where a young man was charged with rape on a young woman. The evidence of the woman was very clear; she swore to the commission of the offence distinctly. On the part of the defence it was shown that for a month or six weeks after the offence they were in daily intercourse, visiting at each other's houses and dining and taking tea together without objection from the parents on either side. When the young woman found that she was pregnant, she accused the young man of a rape. The judge, on hearing of her conduct during the month after the offence, and that the girl had made no complaint even to her mother, charged very strongly for the defence, and said the jury should acquit the prisoner. To his consternation they found him guilty. In such a glaring case he declined to pronounce sentence, and held the prisoner over for trial at the next assizes, and sent a copy of the evidence to me. He protests against this kind of legislation."

The Minister of Justice also declared that his own experience was not favorable to the bill.

"I find (he said) that the bill which is now proposed is substantially the law in many states of the neighboring union, and in France and Germany. It is not the law in Great Britain or in any colony of the Empire, and I think we are bound to ask ourselves whether the state of morals in those countries, as far as we know, leaves anything to be desired on our part; whether there is any evidence before the community—not before the House—but whether we know as private citizens of any evidence leading us justly and soundly to the conclusion that the state of morals in those communities is higher and better than in ours. For my own part, I

feel bound to answer that question in the negative. I do not pretend to have full information on the point; I do not know that any of us have, or that statistics have been published on the subject, but so far as ordinary reading and the information which one can obtain in the intercourse of life can show, I feel bound to say that there is nothing in the state of morals in those countries for us to envy or which should lead us to the conclusion pointed to in this bill. So far as our knowledge of the subject goes, there is no country, probably, where these offences prevail, where the modesty of women is more justly celebrated than in Ireland, yet there is nothing there but the restraints of religion. Are not these restraints sufficiently strong to induce people to maintain a decent state of morals in this respect; they have been found strong enough in the colonies of the Empire and in Great Britain itself. In the kingdom of England and Scotland, which do not, perhaps, in that respect stand on quite so high a level as Ireland, but still occupy a position leaving nothing to be envied in the States of the Union pointed out, or in Germany or France, neither there nor in the colonies is there any disposition to change the law on this grave subject. That being the case, one is curious to understand, and if possible, to appreciate the motives which have induced people to believe that any good could be done by such a measure as this. The bill itself, I am bound to say, does not seem to be prepared with that thought which should have been given to such a subject. It seems to me (I do not desire to express it in any offensive way) to have been drawn for superficial reasons, and not drawn after that study of the question which is necessary to inspire confidence in a measure, and which would commend it to the Legislature. I have practiced at the bar for some years, and I do not remember a case of seduction which commanded the sympathy which an honest man would naturally feel for a betrayed girl. My experience has been rather the other way—that these are cases of mutual and equal guilt, or cases where strong passion has carried away one or the other, or both of the parties.’

SUPREME COURT DECISIONS.

A number of cases from the Montreal District were decided by the Supreme Court on Monday and Tuesday last. In *Harrington & Coxe* (5

L. N. 148), the judgment of the majority of the Court of Queen's Bench has been reversed. A very important question was raised in this case as to the position of the particular legatee, when the property left to him is charged with a hypothec. The Supreme Court holds that the particular legatee is entitled to get the property clear, and that the hypothec has to be discharged by the testator's general estate. In *Bain & City of Montreal* (5 L. N. 76), the appeal was dismissed, Justices Henry and Gwynne dissenting. In *Grand Trunk Railway Co. & Wilson* (5 L. N. 88), the appeal was dismissed. In *Hudon Cotton Co. & Canada Shipping Co.*, (5 L. N. 309) the appeal was also dismissed, Justices Fournier and Henry dissenting. Chief Justice Dorion and Mr. Justice Ramsay dissented from the judgment of the Court of Queen's Bench in this case. In *Bank of Toronto & Perkins*, the appeal was dismissed, and in *Giraldi & Banque Jacques Cartier* (5 L. N. 247), the judgment of the Queen's Bench was affirmed without costs, the Supreme Court being equally divided. We presume that in a case of this kind, leave to appeal to the Privy Council would be granted, if it were applied for.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, JANUARY 27, 1883.

DORION, C. J., RAMSAY, TESSIER, BABY, J.J.

GRANGE (deft. below), Appellant, and DUNCAN McLENNAN (plff. below), Respondent.

Promise of sale—Condition—Default.

Under the promise of sale set forth below, the respondent, not being put en demeure, did not forfeit his right to obtain a deed of sale by his failure to make the yearly payments agreed upon, or by his failure to ratify.

The appeal was from a judgment of the Superior Court, Montreal, (Papineau, J.), July 8, 1881, maintaining the respondent's action, and condemning the appellant to execute a deed of sale in favor of the respondent, of a certain farm in the parish of St. Téléphore, County of Soulanges.

The appellant, a trader residing at Coteau Landing, on the 7th December, 1874, by a promise of sale, agreed to sell to the respondent the farm in question. The price was \$1,200,

of which \$500 was acknowledged to have been received in cash at the passing of the agreement, and the balance of \$700 was to be paid in seven equal annual instalments. The respondent was then a minor, but he was assisted, for the purposes of the agreement, by his father, who was present, and who promised to procure a ratification of the agreement by his son when he should come of age. It was to enforce this agreement that the action was brought by the son, Duncan McLennan, and the judgment of the Court below sustained the suit.

It was contended by the appellant that Duncan McLennan was not entitled to claim the execution of the agreement, because it contained a clause to this effect: that if McLennan failed or neglected to make the payments as they came due he would forfeit all right to obtain a deed of sale, and he would, moreover, forfeit all monies already paid and which might thereafter be paid (which would then be considered as rent of the farm), and the parties would be considered as lessor and lessee. Here was a specific clause of forfeiture under certain circumstances, viz, the failure of McLennan to meet his payments punctually. The forfeiture had been incurred. McLennan became of age in January, 1875, a month after the passing of the promise of sale; the first instalment became due in December, 1875; but McLennan failed to meet either it or subsequent instalments. Further, it was to be remarked that the respondent did not ratify the promise of sale at the time stipulated, viz., when he came of age, and this failure to ratify, it was contended, was fatal. It was also alleged that the promise of sale was annulled by respondent's father in 1879, and the circumstances showed the father intended to make the contract his own. It was not until 1880, nearly six years after he had come of age, that the respondent served a protest upon the appellant, asking for a deed of sale. Lastly, it had been proved that the respondent had no interest in the suit, having transferred his rights, and he had not taken any part in the initiation of the proceedings.

For the respondent it was urged that he had never been put *en demeure* to fulfil the terms of the agreement. The defendant had stipulated the right to have the bargain rescinded in the event of failure to pay the instalments. The

plaintiff was a minor, and until his right had been declared forfeited he was always in time to ratify the promise of sale and ask for a deed. If the balance of price remained for a time unpaid it was through appellant's neglect, as he never demanded it. If it had been asked for it would have been paid, and the amount was tendered in good time. The pretended cancellation by the father was a nullity. As to the interest of the respondent, there was nothing pleaded on this head, and the point did not come up. The judgment of the Court below, it was submitted, should not be disturbed.

DORION, C. J. (dissenting). This action is to compel the appellant to grant to the respondent a deed of sale of a farm situate in the parish of St. Théodore, in compliance with a promise of sale made before Legris, a Notary Public, on the 7th December, 1874.

The appellant pleaded, that the respondent had not fulfilled the conditions of the promise of sale which had thereby become inoperative. The Superior Court has, however, maintained the action and condemned the appellant to give to the respondent a deed of sale in due form, and to deliver over to him the property claimed.

The appeal is from this judgment.

The circumstances which have given rise to the suit are as follows:

By a deed passed before Legris, a Notary Public, on the 7th of December, 1874, the appellant promised to sell the farm in question in this cause, to the respondent, then a minor, but assisted by Roderick McLennan, his father, who promised to have the transaction ratified by his son, when he should have attained the full age of twenty-one years. This promise of sale was made for the sum of \$1,200, of which \$500 were paid, at the time, and as to the balance of \$700, the respondent promised to pay it to the appellant in seven yearly consecutive payments of \$100 each, the first of which would fall due on the first day of October, 1875, with interest at the rate of seven per cent. per annum, to reckon from the first day of October, 1874.

The deed contains the following provision, which has given rise to the present litigation:—

"It is especially covenanted and agreed upon between the said parties hereto, that if the said Duncan McLennan makes regularly the said payments of one hundred dollars said currency, when they will fall due respectively, together

with the interest, till the full payment of said sum of seven hundred dollars, then and in that case the said Thomas Grange will be bound, as he doth hereby bind himself to give the said Duncan McLennan a free and clear deed of sale of said farm; but on the contrary, if the said Duncan McLennan fails, neglects or refuses to make the said payments when they come due, then the said Duncan McLennan will forfeit all right he has by these presents, to obtain a deed of sale of said herein mentioned farm, and he will moreover forfeit all moneys already paid and which might hereafter be paid, which said monies will be considered as rent of said farm, and these presents will then be considered as null and void, and the parties hereto will be considered as lessor and lessee."

At the date of this promise of sale, Roderick McLennan was living on the farm with the respondent and other members of his family. The respondent became of age in the month of January, 1875, and continued to live on the farm with his father for about a year after he had become of age. He then left for the United States, where he still resides. He has not come to Lower Canada since he has left except once, on a visit of three or four days in the fall of 1880—(see Roderick McLennan's deposition, appendix to respondent's factum, p. 7).

The respondent never ratified the promise of sale, as he was bound to do, on his coming of age, and neither he, nor his father Roderick McLennan have paid to the appellant any portion of the principal and interest accrued on the balance of \$700 due on the price stipulated in the said promise of sale. The appellant has moreover been obliged to pay the municipal and school taxes and the seigniorial charges due on said property.

After waiting for several years without receiving either principal or interest, the appellant sought to get back the possession of his property, and on the 6th day of May, 1879, Roderick McLennan, who was still in possession of it, and who it seems had furnished the \$500 which had been paid to the appellant, when the promise of sale was passed, consented to resiliate the same and to give up to the appellant possession of the farm, on condition that he should be allowed to occupy the house till the 1st of November following (1879). A deed was passed to that effect.

Subsequently Roderick McLennan refused to give up the possession of the house, and the appellant obtained a judgment of ouster and finally recovered the possession of the house also.

It was not till the 23rd of October, 1880, after the appellant had been in possession of the farm for nearly eighteen months and of the house for about a year, that a tender was made to him in the name of the respondent, of the sum of \$997.31, as the balance in principal and interest of the price stipulated in the promise of sale of the 7th of December, 1874.

This tender was made through a notary and was accompanied by a demand on the appellant to grant to the respondent a deed of sale in the terms of the promise of sale.

The appellant having refused to comply with this request, the respondent has brought this action whereby he renews his tender, and claims that the appellant be ordered to give a regular deed of sale of the property in question, and to deliver him the possession of the same.

Upon the return of the action, the appellant by a dilatory exception demanded security for costs and a power of attorney from the respondent, as residing in the United States. This demand was complied with, and then the appellant filed a plea to the merits setting forth, that the respondent had not ratified the deed of the 7th of December, 1874, on his becoming of age as required by the said deed, and that he had failed to make any of the payments therein mentioned, and that he had thereby forfeited any right to claim a deed of sale; that Roderick McLennan who had promised to have the said promise of sale ratified by the respondent, had by deed of the 6th May, 1879, annulled and cancelled the said deed of sale, and that the appellant had been compelled to pay \$39.80 for municipal and school taxes and seigniorial dues accrued on said farm, and also \$40 for necessary repairs and \$45.70 for legal expenses; and finally that the tender of the respondent was incomplete and insufficient.

To this plea the respondent answered that he was never asked to pay the balance of the price; that the forfeiture could not be claimed until all the instalments had become due, and he had failed to pay them and the interest thereon; that he had always been ready since he had become of age to ratify the promise of sale, but was never asked to do so; that he never autho-

raised the cancellation of the promise of sale by Roderick McLennan, which was obtained by fraud; that as to the taxes and seigniorial dues, he was never informed that appellant paid the same, and that in any case such taxes and dues should have been paid by Roderick McLennan who was in the occupation of the farm until evicted by the appellant, and who would have paid him;—that the proceedings in ejectment against Roderick McLennan, could in no way affect him, as he was not a party to the suit and he could not be liable for any costs incurred, and that such proceedings were only part of the same fraudulent design of the appellant to deprive the respondent of the property by indirect and fraudulent means; that when the tender was made to appellant, he fully admitted his obligation to convey the farm to the respondent, and promised to do so, only demanding the reimbursement of certain taxes and dues, which respondent, although not bound to pay, yet offered to do so, in order to remove all difficulties and to leave no pretext to the appellant for withholding the conveyance of the farm.

After the issue had been joined and the parties had proceeded to their *enquête*, the respondent made an additional tender of \$31.60 for taxes and seigniorial dues paid by the appellant, and at the same time offered to pay the \$40 alleged to have been laid out in repairs if the Court should so award.

Several incidental points have been raised in this case, but the only really important question in issue is as to the effect of the stipulation contained in the promise of sale, that if the respondent failed, neglected or refused to make the several yearly payments of \$100 and interest agreed upon, when they became due, he should forfeit his right to obtain a deed of sale, and forfeit the monies he had paid, which should be considered as null and void, and the parties considered as lessors and lessees.

The respondent contends that this promise of sale having been accompanied by tradition and actual possession, was under art. 1478, C. C., equivalent to a sale, which could only be dissolved by a judgment at the instance of the appellant. The appellant, on the other hand, claims that the promise is to be governed by the conditions attached to it, and that the failure of the respondent to ratify the promise of sale when he became of age and to pay the

instalments on the balance of the price, as they became due, operated in the terms of the deed as a forfeiture of the rights of the respondent to acquire the property in question.

Art. 1478 C. C. applies to an ordinary and unconditional promise of sale. Here the parties have attached to their transaction a perfectly legitimate condition, the object of which was to enable the appellant to recover back the possession of his property by the simple process as between lessor and lessee, without having recourse to the expensive proceedings of a sheriff's sale, or to that of an action *en résolution de vente* in default of payment of the price of sale. The parties have in effect declared that until the respondent should pay the \$700 remaining on the stipulated price of sale, he should be the tenant of the appellant, and the \$500 paid should be taken in payment of the rent, and that if the balance of \$700 and interest was regularly paid as the several instalments became due, the respondent should then be entitled to claim a deed of sale of the property leased. Art. 1478 C. C. does not apply to such a contract, as it was well decided by the Court of Review in the case of *Noël v. Laverdière* and *The British America Land Co.*, opposants, (4 Quebec Law Rep. 247). If we consider the deed of the 7th of December, 1874, not as a lease with a right to the lessee to purchase, but as a promise of sale followed by possession, it cannot be denied that the promise was made subject to the condition on the part of the respondent of paying the balance of the price by instalments, and that default of paying any of the instalments when they should have been made, defeated any right the respondent could otherwise have claimed, and this without the necessity of any demand to annul the deed.

Even before the Code, when all such clauses were considered as comminatory and required a judgment to discharge the promisor, Pothier in his treatise, *de la vente*, No. 480, 4th paragraph, says: "Quoique je n'aie pas obtenu de sentence, s'il s'est passé un tems considérable, il en peut résulter une présomption que les parties se sont désistées tacitement de cette convention."

Troplong, *vente*, No. 132, commenting on art. 1589 of the French code, says:

"Puisque la promesse de vente est équivalente à la vente, il faut dire qu'elle est sus-

"ceptible des mêmes conditions suspensives et résolutoires que la vente. Il est même assez ordinaire qu'elle soit conditionnelle;" and at No. 134, the author adds: "si celui à qui la promesse a été faite ne se présente pas à l'époque indiquée pour passer contrat, il faut distinguer s'il y a un terme indiqué ou bien si la convention ne porte pas de délai."

"Dans le premier cas, la convention est résolue de plein droit et le promettant est dégagé."

"Dans le second cas, il faut suivre la marche que nous avons tracée au No. 117."

In the present case, the appellant was only bound to sell and to give a contract of sale to the respondent, in case the latter should ratify the promise of sale on his attaining the age of twenty-one years, and pay the balance of the price of sale at the periods fixed by the contract. He has neither ratified the contract, nor paid the instalments on the price as they became due, and therefore, the appellant was *ipso facto* discharged from the obligation to give him a title deed. It is unnecessary to discuss the pretention of the respondent that his right to obtain a deed of sale could only be forfeited after he had failed to make all the payments mentioned in the promise of sale; there is no pretext whatsoever to sustain such a pretention;—The stipulation is plain and applies to the failure to pay any one of the instalments mentioned in the deed.

Laurent, vol. 24, No. 25, speaking of a conditional promise of sale, says:

"La promesse de vente peut-elle être faite sous condition? L'affirmative n'est pas douteuse: l'art. 1854 le dit de la vente, et la promesse bilatérale vaut vente. Il faut en dire autant de la promesse unilatérale, elle forme aussi un contrat; donc elle peut être faite sous condition. On applique, dans ce cas, les principes qui régissent la condition."

"La promesse de vendre se trouve souvent ajoutée à un bail comme promesse de vendre sans que le preneur promette d'acheter; la promesse peut aussi être bilatérale, soit pure et simple, soit sous condition."

"Si la promesse de vente était bilatérale, et pure et simple, quoiqu'ajournée à la fin du bail, par exemple, il y aurait vente et translation de propriété. Partant l'indemnité (due pour expropriation) appartiendrait à l'acheteur. Mais que faut-il décider si la promesse

"est conditionnelle? La vente conditionnelle ne transfère pas la propriété, tandis que la vente à terme la transfère. Tout dépendra donc de l'interprétation du contrat. Est-il conditionnel, l'indemnité sera due, et l'acheteur ne peut la réclamer parce qu'il n'y a pas encore de vente."

This is a good test, and it cannot be seriously contended that in case of expropriation, the respondent could have claimed the indemnity if he had not yet paid the price to the appellant.

The error of the Court below is to have considered the deed of the 7th of December 1874 as a real sale subject to a revocatory condition, in case of non payment by the respondent of the purchase money, instead of a mere promise of sale depending on the payment of the price by instalments as a condition precedent or *condition suspensive*, (art. 1079-1081-1082-1087) which, not having been fulfilled within the delay fixed by the parties, annulled *de plano* the promise of the appellant to execute a deed of sale.

The respondent has all along treated the stipulation as a revocatory clause, and the authorities which he cites, are all applicable to the resolution in default of payment of the price of a complete sale, without noticing that here, the sale was only to take place, if the respondent paid the balance of the purchase money within certain specified terms.

The difference is clearly explained by the writers.

Aubry & Rau, vol. 4, § 302, p. 75—sect. B, say: "La condition suspensive venant à défaut, l'obligation et le droit qui y est corrélatif, sont *ipso facto*, à considérer comme n'ayant jamais existé. Ainsi, par exemple, l'acquéreur qui aurait été mis en possession de la chose par lui acquise sous condition, serait obligé de la restituer avec tous ses accessoires et avec les fruits qu'elle a produits."

Larombière, vol. 2, p. 118, nos. 1, 2 et 3, or art. 1176 & 1177 of the French Code, and p. 120, no. 6.

The respondent has invoked in support of his pretensions, the answer which Gladu, the notary, has inserted in his protest as given by the appellant to the tender made to him on behalf of the respondent: but the appellant having refused to sign the pretended answer, it cannot be invoked against him. The art. 1209 C. C. has an express provision to that effect, and on this point I believe the Court is unanimous. The notary's

declaration cannot give authenticity to such an answer, it is clear that it cannot be proved by witnesses, as the respondent has attempted to do, for such evidence would be a clear violation of art. 1233 of the Civil Code;—even if such evidence was admissible, it is clear from what transpired on the occasion referred to, that no new agreement was entered into between the parties, and neither the tender nor the action are predicated on any such new agreement.

The deed of the 7th December, 1874, merely conveys to the respondent the right to occupy the farm in question, as the tenant of the appellant, coupled with a promise of sale on the part of the appellant, should the respondent pay regularly within the time specified the several instalments of \$100 each and interest to complete the stipulated price of \$1,200, and the respondent having failed to pay any of the said instalments, his right to claim a deed of sale has lapsed. And in the view I take of this case, it is quite immaterial whether the lease or license of occupation precedes or follows in the deed, the promise of sale. It is said, however, that there could be no lease as there was no rent fixed. This is not correct, for art. 1605 specially provides that persons holding real property by sufferance of the owner, without lease, are held to be lessees, and bound to pay the annual value of the property. This shows that there can be a lease without any agreement as to the amount of the rent, which in such case is to be determined by the annual value of the property leased. It is not necessary to decide here whether the five hundred dollars paid by the respondent are altogether lost to him, or if as is more likely, they are forfeited only to the extent, as it seems to have been intended, of the annual value of the property during the time the appellant was deprived of it; the action not being to recover any portion of these \$500, but to recover the property itself.

Even if the condition as to the payment of the price could be considered as a revocatory condition, it could not avail the respondent to compel the appellant to grant him a deed of sale, for according to the authority of Pothier, No. 480, already cited, it was not necessary under the circumstances of the case, that the appellant should have obtained a judgment discharging him of his obligation. This author says, that if a long time has elapsed, a presumption may re-

sult that the parties may have tacitly desisted from their stipulation. In the present case, the appellant has been nearly five years without ratifying the promise of sale, as he was bound to do, to avail himself of its conditions; he almost immediately after becoming of age, left the country without any intention to return, and has since resided abroad; he never fulfilled any of his obligations, and has paid none of the six instalments that became due before the institution of the present action, nor any part of the interest accrued thereon: he did not even pay the ordinary municipal and school taxes and the seigniorial dues which were payable on the property. The only party whom he left in possession of the farm, was his father who from all the circumstances, seems to have been the party really interested in this promise of sale, since the \$500 paid appears to have been provided for by him, and he is the party who having promised to have the deed ratified by his son, and who was left in possession of the farm, has consented to the resiliation of this promise of sale, and has delivered the property over to the appellant. If there is any case in which a party may be presumed to have desisted from a promise of sale, without requiring an adjudication to that effect from a Court of Justice, it is certainly in a case like this where the party has withdrawn permanently from the jurisdiction of the courts which he now invokes, and by his own conduct, has rendered it almost impossible except at a great sacrifice, to obtain that order of cancellation which he alleges, was necessary to deprive him of his pretended right to claim the property from the appellant, notwithstanding his own laches. If his claim is valid now, why should it not still be valid after twenty-nine years' absence, when the property might have doubled and trebled in value and when the appellant to protect it, would have been compelled to disburse large sums of money, or might have parted with it in good faith? The equitable rule laid down by Pothier, seems to have a special application to the circumstances of the present case.

The respondent may possibly claim that in leaving the country, he has not abandoned the possession of the property, but left it in charge of his father. In that case, the father would have been his constituted agent, and the abandonment which he made to the appellant, would under the

circumstances be considered as an act of good administration and be binding on the respondent.

It is not however on these grounds that I base my dissent from the judgment about to be rendered. It is on the broader ground, that the condition precedent on which the promise of sale was made, was not accomplished by the respondent within the specified delay, and the appellant has thereby been released from the obligation entered into to sell the property to the respondent in case he should fulfil his obligation. I would therefore reverse the judgment of the Court below, and dismiss the action of the respondent.

RAMSAY, J. On the 7th December, 1874, the appellant entered into a deed with respondent, then a minor, but assisted by his father, one Roderick McLennan, by which he promised to sell to the respondent a certain farm for \$1,200, on account of which he acknowledged to have received \$500, and the balance was to be paid in sums of \$100 and interest at seven per cent., the first of these instalments to fall due on the 1st of October, 1875, and the interest to be calculated from the 1st October, 1874.

The presence of the father at the passing of the deed was that he might undertake "to have his said son ratify these presents when he will come to the full age of one and twenty years."

The deed then went on: "It is especially covenanted and agreed, etc." (See clause printed above):

Duncan McLennan came of age in 1875, but never got possession of the farm under the provisions of this deed, but Roderick McLennan did, and remained in possession of the house at all events till June, 1880.

On the 6th May, 1879, the appellant and Roderick McLennan made a deed by which they cancelled the deed of promise of sale, and agreed that the \$500 should be for the rent of the premises up to that time. The appellant then brought a suit to evict Roderick.

After the eviction of Roderick McLennan the respondent protested the appellant and demanded a deed for the farm tendering him \$997.31 as for the capital of \$700 and interest, and offering to supplement the same if need be.

The appellant agreed, it is alleged, to accept this offer if the seigniorial dues and taxes were paid, but without stating the amount. The respondent then wrote to the appellant, desiring to know the amount so due, but the appellant failed to declare the amount, and in effect did not make it known till the 10th March, 1881, at *enquête*.

Duncan McLennan then sued the appellant, repeating his tender, and demanding a deed, and to be put in possession of the farm.

The appellant met this action by five propositions: 1st. The instalments were not paid when due, and therefore the original deed became only a lease. 2nd. There was no ratification when the respondent came of age. 3rd. The deed was cancelled according to the terms by Roderick, who as *prête-forc* had a right to can-

cel. 4th. That respondent has no interest in the farm. And 5th, that the tender was insufficient.

The first and third of these propositions alone appear to me to merit consideration. The ratification of the deed was in the interest of the appellant, and he had a right to require it of respondent so soon as he was of age, but not before. This is all the deed says. The appellant having contracted with Duncan has no right to raise the question of Duncan's interest in the way he has done. He may perhaps have some rights as against Roderick, and through him against respondent; but Roderick was not put *en cause*, and the matter, if any, is not pleaded. If respondent be right as to the first question, the tender appears to me to be sufficient for the reasons given in the judgment of the Court below.

If the third proposition be correct, and be applicable to a case like the present, it will be unnecessary to consider the effect of this curious deed. There can be very little question, I think, that the general principle invoked by the appellant is true. If A warrants (*se porte forte*) that B will do a thing, A binds himself to its performance; and this is equally true whether B at the time be *incapable*, or A acts without authority from B. Nor can it be doubted, I think, that so long as the *choses sont entières*, A can discharge himself of his obligation by cancelling the deed. When, however, it appears that the *incapable* has paid or done something in execution of the contract I can hardly understand how any act of the warrantor or of the other party can set aside the deed *without reserving his rights*.

Of course, if the protest and answer are proved, it would strengthen respondent's case; for it would be an acquiescence in respondent's pretensions. But speaking for myself, I do not think the answer is proved. It is not signed, (Art. 1209 C. C.) and I do not think any verbal evidence could be received under our law to establish a title to a property of this value.

Allusion was made to the case of *Munro & Dufresne*. This case is not in point. In *Munro & Dufresne* there was a mere promise of the refusal of certain property up to a certain day, that day having passed the obligation was at an end. I am not aware that an option of that sort, where nothing passed, was held to be of a nature to require a *mise en demeure*. It would be seriously inconvenient if it did.

I am therefore of opinion that there was no cancellation of the deed, and that Duncan McLennan's ratification was *en temps utile*. This seems to me to be the whole question, for the fact of Duncan McLennan being out of the country could not possibly destroy his rights. If he had a right to be put *en demeure*, this must be done, and a deed with an unauthorised person, as Roderick McLennan was, could not affect this right one way or the other. I am to confirm, and this is the opinion of the majority of the Court.

Judgment confirmed.

Doutre & Joseph for the appellant.

Davidson & Cross for the respondent.

The Legal News.

Vol. VI. MAY 12, 1883. No. 19.

LAW FACULTIES.

A Faculty of Law has been established in connection with Dalhousie College, Halifax, N.S. The first chair has been endowed to the extent of \$2,000 per annum, through the liberality of Mr. Geo. Munro, a New York publisher. R. C. Weldon, A.M., has been appointed to the chair. It is proposed to group around this central chair numerous lectureships, so as to make a complete faculty. Several of the leading legal practitioners of Halifax, and at least one judge of the Supreme Court, have promised their co-operation. A chair, to be called the "Gale Chair," has also been established in connection with McGill Law Faculty, the late Mrs. Andrew C. Stuart, a daughter of the late Judge Gale, having left \$25,000 for that purpose.

JUDICIAL CHANGES.

Lord Justice Brett (not Mr. Horace Davey) has been appointed to the vacancy caused by the death of Sir George Jessel. Mr. Justice Fry is transferred to the vacant Lord Justiceship. Mr. Justice Deasy, Chief Justice of the Irish Court of Appeals, died May 6, aged 71. Mr. Justice Deasy was appointed Solicitor General for Ireland in 1859, and in 1861, was nominated Baron of the Exchequer, from which position he was subsequently promoted to the Chief Justiceship of the Court of Appeals. Judge Lawson succeeds to the seat occupied by Mr. Justice Deasy as Justice of the Court of Appeals.

It has been stated, we know not with what truth, that several prominent lawyers have recently declined judgeships. Gossip says that Sir Farrer Herschell refused, because he is making a fortune at the bar, and that Mr. Horace Davey is equally reluctant to go on the Bench, because he is earning \$100,000 a year, and sees no good reason for descending to \$25,000. The history of the past century, however, is full of instances of men giving up the most lucrative practice for the dignity of the bench.

NEW BOOKS.

DROIT CRIMINEL DES ARRESTATIONS, comprenant un Index détaillé des offenses criminelles et leur classification, par B. A. T. de Montigny, Ecr., Recorder de la cité de Montréal, A. Periard, Publisher, 71 St. James Street.

Mr. de Montigny, within the compass of less than 200 pages has brought together a copious store of very useful information relating to criminal offences. The learned author, after remarking upon the importance to peace officers and others of correct information with regard to initiatory proceedings in criminal matters, adds: "Nous avons même l'espoir que cette étude, qui paraît modeste, et qui pourtant a exigé de nous de grandes recherches, sera utile aux juges de paix, à qui incombe généralement le devoir d'émettre des mandats d'arrestation, et même aux juges des cours supérieures qui ont à examiner si souvent les causes et les conséquences d'arrestations. Dans ce but nous examinerons quelles personnes peuvent faire des arrestations et en quel cas elles peuvent les opérer; et pour cela il nous faut distinguer quelles offenses sont *felonies* (*felonies*); lesquelles sont *délits* (*misdeemeanors*); lesquelles sont de simples contraventions, et lesquelles sont punissables par voie de mise en accusation (*indictable*), ou punissables par voie de conviction sommaire hors des sessions (*summary conviction out of sessions*), car suivant que les offenses sont classées dans l'une ou l'autre de ces catégories les arrestations se font par différentes personnes et de différentes manières."

The index comprises 140 pages. The author also devotes 45 pages to the following subjects: Art. 1. Who may arrest without warrant. 2. By whom the warrant may be executed. 3. When and where the arrest may be made. 4. How the arrest may be effected.

The work is executed with care, and indicates considerable research. It will doubtless be welcomed by the profession and others as a valuable guide in criminal proceedings. Copies may be obtained from Mr. A. Periard, 71 St. James Street, Montreal.

A DIGEST OF THE LAW OF CRIMINAL PROCEDURE IN INDICTABLE OFFENCES, by Sir James Fitzjames Stephen, K.C.S.I., D.C.L., A Judge of the High Court of Justice, Queen's Bench

Division, and Herbert Stephen, Esq., LL.M.,
Barrister-at-Law. London and New York,
Macmillan & Co. Montreal: W. Drysdale
& Co.

Mr. Justice Stephen, in addition to his judicial duties, has, with wonderful energy, applied himself of late to the completion of his series of works on criminal law. We noticed in a recent issue his brilliant and elaborate history of the Criminal Law, in three considerable volumes, the most complete work of its kind. The learned Judge has also in press a new edition of his Digest of the Criminal Law, and a fourth edition of his Digest of the Law of Evidence has recently been put forth. The series is completed by the work now before us, a Digest of the Law of Criminal Procedure. It is anything but voluminous, for the entire work, including the Index, is comprised within 230 pages of fair clear type, but every lawyer knows that the labour of compiling so compendious and lucid a digest is much greater than the preparation of a bulky treatise. The arrangement is very orderly and systematic; in fact, this digest might serve the purpose of a Code. The subjects are treated in the following order:—

Part I. Extent of the Criminal law with regard to place, persons, and time.

Part II. The Constitution of the Criminal Courts.

Part III. Arrest, examination before Justices, and committal of offenders with proceedings incidental thereto.

Part IV. Extradition, Foreign offenders, and return of fugitive criminals from British possessions.

Part V. Accusation.

Part VI. Criminal Pleading.

Part VII. Arraignment—Trial—Appeal.

Part VIII. Costs—Rewards—Restitution of Property.

The work will commend itself to the lawyer. Nowhere else can be found so clear, complete and authoritative a statement of English Criminal Procedure. That the learned author should, amidst the enormous labors of an English Judge, have been able to do such good work is ground for astonishment. Mr. Herbert Stephen, his lordship's son, has aided him in the preparation of the volume.

The work is for sale by Messrs. W. Drysdale & Co., Montreal.

NOTES OF CASES.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

March 8, 1893.

Before LORD BLACKBURN, SIR BARNES PEACOCK,
SIR ROBERT P. COLLIER, SIR RICHARD COUCH,
SIR ARTHUR HOBBHOUSE.

ELLIOTT et al., (piffs.) Appellants, and LORD et al., (defts.) Respondents.

Charter party—Demurrage—Prompt despatch.

Held (reversing the judgment of the Q. B., 5 L. N. 124), that want of diligence on the part of the lessees (defendants) was established, the delay which occurred in loading the vessel being caused by the deficiency of coals at the port, and not by the necessity of taking turn according to the custom of the port.

PER CURIAM. This is an appeal from a judgment of the Court of Queen's Bench for Lower Canada, in the Province of Quebec (Appeal Side), in an action by the appellants against the respondents to recover damages in the nature of demurrage for the detention of the appellants' ship, the "Gresham," at Sydney, N. S., whither she had gone to load under a charter party dated the 12th of June, 1872. Mr. Justice Torrance, as the Judge of the Superior Court for Lower Canada, Province of Quebec, District of Montreal, on the 21st May, 1880, decided that the "Gresham" was unduly detained for seventeen days, and condemned the defendants in £850 damages, with interest and costs. This decision was reversed on the 21st of March, 1882, by three of the judges of the Court of Queen's Bench (Appeal side), one Judge, Mr. Justice Cross, dissenting.

No objection was made in this appeal to the amount of the damages, and it was agreed before their Lordships by the respondents' counsel that, if the appellants are entitled to recover damages, they are to be calculated for seventeen days at the rate of £50 per day, as was adjudged by Mr. Justice Torrance.

The appellants were the owners of a steamship called the "Gresham," and the defendants were merchants trading at Montreal under the firm name of Lord, Magor & Munn. On the 12th of June, 1873, the plaintiffs, through Mr. John G. Sidey, their agent at Montreal, entered

into a charter party with the defendants for the hire of the "Gresham," then at Liverpool. The material part of it is as follows:—

"It is this day mutually agreed between J. G. Sidey, of Montreal, agent of the good steamship or vessel called the "Gresham," whereof ——— is master, of the measurement of 1801—1162 tons, or thereabouts, now in Liverpool, of the one part, and Messrs. Lord, Magor & Munn, of Montreal, that the said ship being tight, staunch and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Sydney, or other port, or so near thereunto as she may safely get, and there load from the factors of the said merchant a full and complete cargo of coals, taking her turn with other steamers, but taking precedence of sailing vessels, and receive prompt despatch in loading and discharging, and to load and discharge always afloat."

The "Gresham," under the command of E. G. Bulkeley, the master, proceeded from Liverpool to Sydney, and arrived there on the morning of Saturday, the 19th of July, 1873, when the master, about 9 a.m. on that morning, notified to Messrs. Archibald & Co., of Sydney, the agents of the charterers there, that she was ready to receive and load her cargo under the charter party. On the 25th of July a few bunker coals were shipped, but no cargo coals were shipped on board the "Gresham" until the 4th of August, on which day she began to take in cargo coals, and finished loading on the 13th. She was then compelled to leave with less than her full cargo by 300 tons, but no question arises as to this.

The appellants in their declaration alleged that the defendants did not according to the terms of the charter party load the "Gresham" with a full and complete cargo of coals, taking her turn with other steamers, but taking precedence of sailing vessels, and afford and give the said steamship prompt despatch in loading her cargo of coals. And the defendants by their plea averred that they complied with the conditions of the charter party, and that the "Gresham" had her turn with other steamers, taking precedence of sailing vessels, according to the custom and usage of the port of Sydney, and had prompt despatch in loading at Sydney.

The material evidence upon this matter is

that of Mr. Frederick N. Gisborne, the only witness called for the defendants, and the entries in a shipping book of which he produced a copy, and which, he said, contained a complete history of the business done during the period to which they relate. Mr. Gisborne stated that he was the engineer of two or three coal companies at Sydney; that all vessels loading from the mines he was attending to were of necessity reported to him, and no other person had any right to enter reports of vessels. Each vessel was put down in turn in the book at the time it was reported, and they were loaded in that order. None of the steamships that were berthed or reported after the "Gresham" were loaded before her, and the "Hibernia" being reported before the "Gresham," was loaded before her. They gave the "Gresham" coal as fast as they could deliver it—as fast as facilities of the mines would allow; the facilities of the pier were greater than the production of the mines, and the vessels could have been loaded in a shorter time or with more despatch if the facilities at the mines had been better.

The following is a copy of the entries in the shipping book:—

"Extracts from Shipping Book.

"1873.

"SS. Kangaroo—Telegraph Cable Fleet.

"Commenced loading, 19th July. Completed, 24th. Cargo, 761 tons.

"SS. Gresham—Report, 22nd July. Commenced loading, 25th. Completed, 13th August. Cargo, 1,830½ tons.

"Schr. Heroine—Arrived, 22nd July. Loaded, 24th. Cargo, 120 tons.

"Schr. Fear Not—Arrived, 24th July. Loaded, 25th. Cargo, 52 tons.

"Schr. Trial—Reported, 25th July. Loaded, 26th. Cargo, 41 tons.

"SS. Hibernia—Telegraph Fleet.

"Reported, 19th July. Commenced loading, 30th. Completed, 5th August. Cargo, 1,901 tons.

"Schr. Rebecca Ann—Arrived, 31st July. Loaded, 1st and 2nd August. Cargo, 192 tons.

"SS. Alpha—Completed discharging, 1st August. Commenced loading, 7th August. Completed, 16th. Cargo, 1,959 tons.

"SS. R. M. Hunton took 143 tons bunker coal 6th and 7th August.

"SS. Crosby took 234 tons bunker coal 11th and 15th August."

It was explained by Mr. Gisborne that the three schooners, "Heroine," "Fear Not" and "Trial," occupied inside berths where no large steamers could lie, and the loading of them did not interfere with the loading of the larger vessels. But the "Hibernia," which was reported on the 19th July, did not commence loading until the 30th, and between the 24th and 30th only three small cargoes of 120, 52 and 41 tons respectively, were loaded, viz., on the 24th, 25th and 26th. No coals were loaded on the three following days, and the loading of the "Hibernia's cargo" of 1,901 tons was completed between the 30th of July and the 5th of August. The loading of the "Gresham's cargo," 1,830½ tons, was completed between the 4th and 13th of August, only a few bunker coals having been loaded on the 25th of July. These dates show the time within which it was possible to load the cargoes if the coals had been ready.

The arrival of the "Gresham" having been notified to the defendants' agents on the 19th of July, the plaintiffs were, by the terms of the charter party, entitled to a full and complete cargo of coals on that day. The respondents' counsel did not dispute that when the ship is ready to load the charterers must have a cargo ready, but he contended that they were not bound to do anything till the ship was in her turn, and it was not shown that she did not begin to load before the 5th of August because the cargo was not ready. The facts, however, are, that the defendants employed the same person, the agent of the coal companies, to load the "Gresham" as was employed to load the "Hibernia." In consequence of the delay in getting the coals down from the mines, there was not a sufficient supply at the port, by which the loading of the "Hibernia" was delayed. This deficiency of coals, and not the waiting for her turn, was the cause of the "Gresham" not sooner obtaining her cargo.

The defendants undertook that the ship should receive prompt despatch in loading, and their Lordships are of opinion that they are responsible for this delay.

It is not necessary to consider whether the "Gresham" was thus delayed for the whole of the 17 days, it having been agreed that £850 shall be taken as the amount of the damages. Their Lordships, therefore, will humbly advise

Her Majesty to reverse the decree of the Court of Queen's Bench (Appeal Side), and to affirm the judgment of the Superior Court of the 21st of May, 1880, with costs. And the respondents will pay the costs of this appeal.

C. P. Butt, Q. C., and Dunlop & Lyman, for Appellants.

Cohen, Q. C., and Kerr, Carter & McGibbon, for respondents.

COUR SUPÉRIEURE.

MONTRÉAL, 10 Mars 1883.

Coram LORANGER, J.

Ex parte JOSEPH ROBERT, Requéran pour Certiorari, et la CITÉ DE MONTRÉAL, intimé.

Cité de Montréal—Taux des prix pour les voitures à louage.

Le cahier des charges qui règle le prix de louage des voitures de place s'applique au cas de courses commencées dans la Cité de Montréal et terminées hors de ses limites.

PER CURIAM. Il s'agit dans cette cause d'un appel par bref de certiorari d'un jugement prononcé par le Recorder de la Cité de Montréal, le 3 août 1881. Le requérant, cocher de place, a été poursuivi par Joseph Clément Dansereau pour "avoir demandé un prix plus élevé que celui contenu dans le cahier des charges pour les voitures de louage en la cité de Montréal, savoir: la somme d'une piastre et cinquante centimes, pour avoir conduit le dit dénonciateur avec deux autres personnes dans une voiture de louage alors conduite par lui comme tel cocher, savoir un carrosse tiré par un cheval, savoir une heure en la dite cité, y compris dix minutes hors des limites de la cité, le dit Joseph Robert étant là et alors conducteur d'une voiture de louage comme susdit, en contravention au règlement du Conseil de la Cité." Tels sont les termes mêmes de la plainte.

L'offense est qualifiée dans les mêmes termes dans la conviction, avec cette différence qu'on y a ajouté les mots suivants, savoir: l'engagement du dit Joseph Robert au dit Joseph Clément Dansereau pour la dite course ayant été passé dans la limite de la cité.

Le requérant a été condamné à une amende de \$5 avec les frais, se montant à \$4.35, et à un emprisonnement d'un mois à défaut de paiement.

Il résulte de l'examen des pièces et des faits

tels que consignés dans l'affidavit de circonstance, que le nommé Dansereau et deux autres personnes auraient été transportées dans la voiture du requérant depuis la place Jacques-Cartier, dans la cité, jusqu'à la gare du chemin de fer de Q., M., O. & O., au Mile End, en dehors des limites de la cité où les dites personnes laissèrent la voiture, après avoir été conduites à différents endroits dans la cité, et le requérant exigea d'elles la somme de \$1.50.

Le requérant se plaint de la conviction prononcée contre lui et invoque au soutien du certiorari les moyens suivants :

10. Que le cahier des charges qui règle le prix de louage des voitures de place, ne pourvoit pas au cas de courses ou voyages commencés dans la cité et terminés hors de ses limites, et ne fixe point le prix à être payé pour telles courses ou voyages.

20. Que les termes de la conviction diffèrent de la plainte.

30. Que l'offense pour laquelle il a été condamné n'existe pas sous le règlement qui a servi de base à la plainte.

Les dispositions du règlement en question qui s'appliquent à la cause sont énoncées dans la section onse, c'est celle qui détermine le taux des prix tant à la course pour les voitures de louage tirées par un ou par deux chevaux. Le prix de l'heure pour trois personnes dans une voiture tirée par un seul cheval, est fixé à la somme d'une piastre, et il y est déclaré que les fractions d'heure seront chargées au prix de l'heure, et qu'on ne chargera pas moins d'un quart d'heure, lorsque la course dépassera l'heure.

Dans l'espèce, la course n'a duré qu'une heure, et si elle eut été faite en entier dans les limites de la ville, le requérant n'aurait eu droit qu'à une piastre, ce qui aurait constitué une surcharge de cinquante centins de sa part.

Mais la course s'est terminée en dehors des limites de la ville, et l'on prétend qu'il n'y a plus lieu à l'application du règlement; que dès que la voiture du requérant a franchi les limites de la ville, il lui était libre d'exiger la somme qu'il a demandée, et qui, suivant le requérant, est la charge usitée.

Je ne puis admettre cette prétention, qui, au reste, est formellement contredite par les termes mêmes du règlement, où l'on trouve en toutes lettres la disposition suivante : *le prix à l'heure*

s'applique à toutes les courses au-delà des limites de la cité, dès que l'engagement est passé dans les limites de la cité.

Peu importe que la course se soit terminée dans les limites ou hors les limites de la ville, le cocher licencié dont l'engagement a été fait dans la ville, n'a droit pour sa course à l'heure qu'à la somme fixée par le tarif. Dès que l'engagement a eu lieu dans la juridiction du Recorder, il est amenable devant lui pour infraction au règlement.

On a prétendu qu'il n'y avait pas eu d'engagement dans le cas actuel.

Il n'est pas nécessaire qu'il y ait un contrat formel; ce contrat s'opère par le seul fait que le voyageur requiert l'usage de la voiture; quant au prix il est déterminé d'avance par les règlements de police, et il n'est pas au pouvoir du cocher de les augmenter ni au pouvoir du voyageur de les diminuer.

Le requérant ayant, ainsi qu'il l'admet, transporté dans les limites de la ville les personnes ci-dessus nommées pendant cinquante minutes, et dix minutes en dehors de la ville, n'a fait qu'une seule et même course d'une heure, et n'a droit qu'au montant fixé par le règlement en question.

La conviction est maintenue et le certiorari renvoyé avec dépens.

St. Pierre & Scallon, pour le requérant.

R. Roy, Q.C., pour l'intimé.

SUPERIOR COURT.

MONTREAL, April 6, 1883.

Before MATHIEU, J.

SMARDON v. HAMILTON et al., & HAMILTON,
Opposant.

Procedure—Opposition stamped and enregistered on the return day, after service.

Execution issued from the Superior Court, Montreal, to seize moveables, at New Carlisle, District of Gaspé. An opposition to withdraw supported by affidavit, was served on the seizing officer, and then sent to the Superior Court at Montreal, to be stamped and enregistered.

Plaintiff moved to have the opposition dismissed, because it had not been stamped and enregistered before being served. For the opposant it was contended that in cases where the seizure was effected at such a distance from the Court issuing the writ, it would be impos-

sible to enregister and stamp the opposition in that Court in time to prevent the sale. Here, the only practicable method had been adopted, viz., to serve the opposition first, and to stamp and enregister it on the day of the return.

After citing the Act 12 Vict., c. 112, whereby the Governor in Council is empowered to impose by order in council such taxes on legal proceedings as he may deem necessary for the purposes specified in said Act, and the order in council dated at Toronto, the 26th of April, 1850, published in "The Canada Gazette," of 4th May, 1850, fixing the stamp duty on proceedings such as the present, the learned judge adds the following *considérants* :—

"Considérant que la nullité prononcée par le dit statut et par le dit ordre en conseil n'est pas une nullité absolue, mais peut être couverte par le paiement et l'apposition des timbres mentionnés au dit statut ;

"Considérant que la dite opposition paraît avoir été faite et assermentée à New Carlisle le 10 mars dernier, et que l'original a été signifié à l'huissier chargé du bref d'exécution émis en cette cause le dit jour 10 mars dernier, et qu'elle a été rapportée au greffe de cette Cour le 28 mars dernier, et que lors du rapport de la dite opposition, savoir, le dit jour 28 mars dernier, des timbres ont été apposés sur icelle du montant voulu par le dit ordre en conseil pour payer les taxes ;

"Considérant que ce paiement des taxes sur la dite opposition ainsi faite le 28 mars dernier couvre la nullité dont pouvait être affectée la dite opposition antérieurement à ce paiement ;

"Considérant que la motion du dit demandeur demandant le rejet de la dite opposition est mal fondée sous ce rapport, et aussi quant aux autres moyens contenus dans la dite motion, a renvoyé et renvoie la dite motion."

J. P. Cooke, for plaintiff.

• *N. Tremblay, attorney for defendant.*
Wotherspoon & Lafleur, counsel.

[J.L.]

SUPERIOR COURT.

MONTREAL, April 30, 1883.

Before LORANGER, J.

Ex parte MARCELINE NOEL, Petitioner for writ of Certiorari, and DURNFORD, Respondent.

License Act—Intoxicating liquors.

The petitioner was convicted of selling liquor without license. It was pretended that the liquor

sold was a mere imitation of cider, free from any intoxicating principle. Cider is enumerated in the License Act among intoxicating liquors, and the preparation in question did, in fact, contain over two per cent. of alcohol. Held, that the conviction was good.

PER CURIAM. Demande de révision par voie du *certiorari*, d'une conviction prononcée le 2 août 1881, par M. Desnoyers, magistrat de police, sous l'acte des licences.

La requérante a été condamnée pour avoir vendu sans licence, le 29 juin de la même année, de la liqueur enivrante.

La liqueur vendue est un breuvage appelé cidre de Christin.

Il a été vendu par la requérante, comme étant du cidre.

Les notes de la preuve, telles que prises par M. Desnoyers, sont au dossier, et il appert qu'un chimiste, M. Crevier, aurait analysé quelques bouteilles contenant cette liqueur dite cidre de Christin. Suivant ce chimiste, il n'y aurait qu'une imitation de cidre ; ce serait un breuvage composé d'eau, de sucre, d'acide tartrique, et d'une proportion d'alcool variant de 2 à 2½ par cent. D'après lui, ce n'est pas une boisson alcoolique, vineuse ni fermentée, mais seulement une liqueur gazeuse, et ne contient pas une proportion d'alcool suffisante pour dire qu'elle renferme un principe enivrant.

Un autre témoin, et celui-là est le témoin le plus certain sur la composition du breuvage incriminé, puisque c'est le fabricant même de cette liqueur, le nommé Beaudoin, déclare qu'il entre dans ce breuvage de l'huile de pomme, et qu'il est obligé d'y mettre de l'alcool pour dissoudre cette huile. Il a le soin toutefois de déclarer, que sa liqueur n'est pas enivrante et qu'il ne paye aucun droit à l'État pour la fabriquer.

La poursuite a été intentée pour contrevention à la section 71 de l'acte des licences (41 Vict., ch. 3) qui déclare que quiconque tient dans la cité de Montréal, sans être muni d'une licence à cet effet, une auberge, hôtel de tempérance, restaurant, et y vend de la liqueur enivrante, est passible pour chaque offense, d'une amende de \$95.00. Il s'agit donc de savoir, quelles sont les breuvages reconnus par le statut comme liqueurs enivrantes. Or, en référant aux clauses d'interprétation, voici ce qu'on y lit : "les mots liqueurs enivrantes" sont l'eau de

vie (brandy), la *guilâve* (ou rum), les vins de toute sorte, l'ale, la bière, le *lager beer*, le *porter*, le cidre, et "toute liqueur qui contient un principe enivrant, et tout breuvage composé en tout ou en partie d'aucune de ces liqueurs."

Les termes du statut sont clairs et précis, et ne laissent aucune place au doute, sur la prohibition qui s'attache à la vente sans licence, du breuvage connu sous le nom de cidre. L'acte de 1878 n'est en cela que la reproduction de la 14 et 15 Vict., chap. 100, et du chap. 17 des S. R. B. C.

La requérante a vendu une liqueur qu'elle dit elle-même être du cidre, et ne s'est pas munie de la licence voulue; peut-elle maintenant être admise à opposer à l'officier du Revenu qui la trouve en faute le subterfuge de la contrefaçon inférieure du fabricant de cette liqueur? Si l'on décidait dans l'affirmative, il faudrait également absoudre ceux qui vendent sous le nom de brandy, gin ou whiskey, les liqueurs empoisonnées qu'ils fabriquent avec des drogues achetées à la pharmacie.

L'officier du Revenu serait lui-même obligé de soumettre à l'épreuve de l'analyse chimique le breuvage incriminé, avant d'intenter sa poursuite. Ainsi, dans l'espèce, la requérante a vendu, dans son auberge, une liqueur renfermée dans des bouteilles sur lesquelles se trouve inscrit le nom d'une liqueur sujette à licence; l'inspecteur en reçoit l'information et son devoir l'obligeait à faire punir l'offense. D'après la requérante, il aurait fallu, avant de prendre la poursuite, qu'il se transportât à l'établissement du fabricant ou constituât son bureau en cabinet de chimie pour faire l'analyse de cette liqueur. Le magistrat lui-même, nonobstant l'aveu de l'accusée qu'elle a vendu sans licence une liqueur connue sous un nom sujet à prohibition, serait obligé d'appeler les chimistes à son aide pour la protéger contre sa propre ruse, ce qui l'entraînerait peut-être à condamner l'officier public qui a été la victime de cette ruse.

Cela conduirait à l'absurde; voilà tout.

Le chimiste Crevier dit que la liqueur en question, n'était qu'une imitation du cidre, c'est-à-dire un breuvage composé d'eau de sucre, d'acide tartrique et d'alcool, ce dernier liquide n'y entrant que dans la faible proportion de 2 à 2½ par cent. L'autre témoin mieux renseigné que lui, puisque c'est le fabricant lui-même, ajoute qu'il y entre aussi de l'huile de pomme.

Or, qu'est-ce que le cidre, c'est-à-dire la liqueur prohibée par le statut, si ce n'est le jus de la pomme qui renferme lui-même la plupart des éléments qui constituent la liqueur vendue par la requérante. Pourquoi le cidre a-t-il été classé parmi les liqueurs enivrantes, si ce n'est en raison de l'alcool que renferme cette liqueur? Dans l'espèce, ce n'est pas du cidre pur, mais pour les besoins de la contrefaçon on se sert de l'huile ou de l'essence de pomme, qui est la base même de la fabrication du cidre; puis on ajoute au sucre un composé chimique pour activer la fermentation et l'alcool pour la consistance, et l'on obtient ainsi un cidre artificiel. C'est de la contrefaçon, mais on y trouve la plupart des éléments qui sont la raison même de la prohibition attachée à vente de la liqueur que l'on a imitée.

Or que dit le statut: "les mots liqueurs enivrantes sont l'eau de vie, etc., etc., le cidre et toute autre liqueur qui contient un principe enivrant, et tout breuvage composé en tout ou en partie d'aucune de ces liqueurs. Ces mots en tout ou en partie, mis en regard du témoignage du fabricant Beaudoin qui admet que la liqueur en question contient de l'huile de pomme et de l'alcool, ne sont-ils pas la condamnation de sa contrefaçon, et partant celle de la requérante?"

Le magistrat saisi de la plainte n'avait aucune discrétion à observer. La liqueur vendue par la requérante contient un principe enivrant et est composée en partie du jus de la pomme, et les termes du statut sont tels, qu'il n'y a lieu qu'à l'application de la peine voulue par la loi. En vain, dira-t-on avec le témoin Crevier, que la quantité d'alcool renfermée dans le breuvage vendu, est si minime, qu'on ne peut pas dire qu'elle contienne un principe enivrant. Le cidre lui-même ne contient de l'alcool, que dans une faible proportion; cependant il est noté par la loi comme boisson enivrante, et la vente sans licence en est prohibée. Pour le grand nombre sans doute il est inoffensif, et on peut se demander avec quelque raison, pourquoi ce breuvage a été classé parmi les boissons enivrantes. Mais le magistrat n'a rien à y voir; il prend la loi pour ce qu'elle est et non pour ce qu'elle pourrait être, et en fait l'application. Pour supposer au magistrat un pouvoir discrétionnaire, en semblable matière, il faudrait également qu'il put être juge de la capacité du buveur. Tel breuvage peut être inoffensif pour les uns, et enivrant pour les autres.

Ce que la loi veut, c'est la prohibition de la vente sans licence de l'alcool ; et la législature pour atteindre le but a désigné les boissons reconnues comme étant alcoolisées, et il a eu le soin d'ajouter, et tout breuvage composé en tout ou en partie de ces liqueurs, sans faire distinction quant à la proportion ou la quantité de la substance qui constitue le principe enivrant.

Je suis d'avis que M. Desnoyers a donné au statut l'interprétation qu'il comporte, et que son jugement est sur ce point conforme à la loi et à la preuve.

On a prétendu de la part de l'intimée que la Cour Supérieure était sans juridiction à connaître de cette preuve sur le bref de certiorari. En thèse générale, cette prétention est bien fondée ; mais dans l'espèce actuelle, la Cour devait inévitablement prendre les notes du magistrat en considération, la requérante faisant reposer sa cause sur cette preuve. Elle prétendait qu'elle avait été condamnée pour une offense non reconnue par l'acte des licences, et qu'une injustice grave avait été commise à son égard. Le fait ne pouvait être établi que par la preuve, et je crois qu'il y avait lieu à l'application du paragraph trois de l'article 1221 du Code de procédure civile.

Entre autres moyens au soutien de son Bref de certiorari la requérante a prétendu que la conviction était irrégulière, en autant qu'elle comporte que l'offense aurait été commise un jour autre que celui mentionné dans la plainte.

Les sections 205, 261 de l'acte des licences sont celles qui règlent la question. La formule I qui, aux termes de la section 261, forme partie de la loi, démontre que la mention d'une date précise n'est pas absolument requise. L'indication que l'offense a été commise à telle date et à différentes reprises, avant et depuis, est suffisante. Dans l'espèce, la plainte mentionne le 26 comme date de la vente, et les témoins admettent que c'est le 29 qu'elle a eu lieu. Cette variation n'est pas fatale, et au reste n'est pas un moyen pour faire casser la conviction.

On a aussi prétendu à l'audience que la qualité du poursuivant n'avait pas été prouvée. La poursuite a eu lieu au nom de M. Durnford, inspecteur des licences pour la deuxième division du district de Montréal, et on reproche à l'intimé de n'avoir pas prouvé sa qualité officielle, ce qu'il aurait dû faire par la production de sa commission.

La juridiction du poursuivant apparaît à la face même de la sommation, et il n'y a pas lieu à discuter sur certiorari la question de preuve sur ce sujet.

Un autre grief de la requérante s'insère du fait qu'il y aurait une surcharge de 10 centins dans le mémoire de frais porté dans la conviction.

La juridiction du magistrat était limitée quant au quantum de l'amende, en vertu de la section 71 qui en fixe le montant à la somme de \$95, mais en est-il de même quant aux frais ? Il a le droit de condamner aux frais, ce qu'il a fait dans l'espèce. Le mémoire contiendrait une surcharge de 10 cts., faut-il conclure que le magistrat a excédé sa juridiction en condamnant à les payer ? Je ne le crois pas. Outre que je ne trouve aucune preuve de cette surcharge, le mémoire de frais étant régulièrement taxé par l'officier de la Cour, compétent à le faire, je ne pense pas qu'il y aurait matière à casser la conviction sur ce point. La question pourra peut-être se présenter sur une autre procédure, si toutefois la requérante ne satisfait pas au montant de la condamnation.

Le dernier grief du requérant repose sur le fait que l'offense ne serait pas suffisamment décrite dans la plainte et la conviction. L'accusation est dans les termes suivants : "pour avoir vendu de la liqueur enivrante." Le requérant prétend qu'il aurait fallu indiquer le nom de la liqueur.

Les sections de l'acte des licences qui régissent la procédure à ce sujet sont les sections 71, 202, et suivantes 214 et 261 déjà citées. Il résulte de leur ensemble qu'il suffit de dénoncer le fait que le défendeur a vendu sans licence des liqueurs enivrantes en indiquant le lieu et l'époque, sans qu'il soit nécessaire d'en préciser exactement la nature et la qualité dans la déclaration.

La section 214 déclare qu'il n'est pas nécessaire qu'il soit déposé de la description exacte de la liqueur vendue, ni qu'il soit fait mention de sa quantité, excepté dans les cas où la quantité est essentielle pour créer l'offense. Dans l'espèce, il ne s'agit pas de l'infraction aux dispositions de la loi qui règle la quantité à être vendue, mais bien de l'unique offense d'avoir vendu sans licence de la boisson enivrante, et je crois qu'aux termes de la section 71, la plainte et la conviction sont suffisamment libellées.

Le bref de certiorari est renvoyé et la conviction maintenue avec dépens.

Writ quashed.

*St. Pierre & Scallon, for petitioner.
Bourgoin & Co., for respondent.*

The Legal News.

Vol. VI. MAY 19, 1883. No. 20.

PROVINCIAL POWERS OF TAXATION.

The provincial legislature, in imposing a tax upon Banks and other corporations, may be assumed to have acted experimentally. The precise extent of provincial powers can hardly be ascertained with certainty until a province tries to overstep the mark, just as a person shut up in a dark chamber will not know the size of the apartment until he has groped about and encountered the surrounding walls. In this instance the legislature passed a statute which would answer the purpose very well, so far as the raising of the required revenue was concerned, but the Court has discovered as many defects in it as existed in the famous definition of a crab. The taxation is indirect, and the province has only the power of direct taxation; it is borne chiefly by persons who are not inhabitants of the Province, and the legislature has only the power of taxation within the Province; it affects banks and banking, and these are matters wholly beyond the control of the provincial legislature. The decision of Mr. Justice Rainville is only in the cases against banks, but it is obvious that, at all events, the first two grounds for the dismissal of the action in *Lambe v. Ontario Bank* will apply to most of the suits against other corporations. It is understood that the case is to be taken to appeal.

JUDICIAL OPINIONS.

The *Ohio Law Journal* says:—"We have received so many communications and so many personal appeals from those who are among the best lawyers in the State, asking what can be done to induce the Supreme Court and the Supreme Court commission to write shorter opinions than usual, and to report *only* those cases entirely novel or involving new legal propositions; that we mention the matter at the risk of being considered meddlers. The tenor of the criticism is not that there exists any prolixity, or that the opinions of the court are at all tedious or long drawn out. It is ad-

mitted that every sentence written by each of the judges is full of pertinent meaning. It is only suggested that less might be said. That where authorities are cited in support of the rulings, the simple citation ought to be made to suffice, leaving it to others to draw the conclusions or find the logic of the application. That the Supreme Court need not formulate any argument to justify its rulings; that where the question is new, the reason for the decision may be briefly stated; and where there is a departure from the usual course of decision, that the opinion of the court ought not to be circumscribed.

"The Supreme Judicial Court of Massachusetts is constantly cited as a model, and it must be confessed that that court is wonderfully frugal in the matter of words. The fact of the matter is that some judges of lower courts, who have had but limited experience on the bench, seem inclined to believe that their reputation for erudition depends to an extent, upon the length of their written opinions; while attorneys generally consider that when a judge disposes of a question in a few words, he is master of the authorities and their relation to the case at bar. Attorneys who lose a case in the Supreme Court find great consolation in a lengthy opinion, although it concludes by ruling against them; as if their argument had almost won the court to their view of the case.

"The Supreme Court of Pennsylvania recently, in a case wherein seven eminent lawyers had argued eloquently and learnedly for three days, decided the case and told why, in *two lines*—less than twenty words. It is recorded that the attorneys were not seen "abroad" for as many days, and yet the case was righteously decided and fully reported.

"The statement of this case will occupy several pages of the reports, and the opinion will simply say: 'The judgment of the lower court is affirmed on the authority of *Doe v. Roe*, 49 Penn. St. 50.' How many cases might be boiled down to something like these dimensions and marked in the weekly record 'no further report,' we of course cannot say. There may be some and may be none. As an item of news we simply assert that many adhere to the belief that there are some, while others will not admit as much."

THE VISIT OF CHIEF JUSTICE COLERIDGE TO AMERICA.

To the Editor of THE LEGAL NEWS.

DEAR SIR,—It is to be hoped that the bar of this Province will not lose the opportunity of exhibiting their respect for the office and person of the Lord Chief Justice of England who is shortly to visit this continent. A meeting of the members of this the Metropolitan District, should at once be convened and the matter considered. As His Lordship will arrive within a few days, I would request our new and learned *Batonnier* to act in the premises without delay.

Yours, obediently,

M.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

QUEBEC, May 4, 1883.

DORION, C. J., RAMSAY, J., TESSIER, J., CROSS, J.,
BABY, J.

CONROY & ROSS.

Procedure—Interlocutory judgment—Appeal.

The action issued from the Court in Quebec, and was served on the defendant at his domicile in the district of Aylmer.

The defendant filed an exception *déclinatoire*, setting up that the *whole* cause of action did not arise at Quebec. The original contract, which was for advances to get out timber, was made at Quebec. It being found advantageous to sell the timber in England, the parties subsequently agreed that the plaintiff should send the timber there to be sold, the plaintiff paying the expenses at Quebec and in England.

The Court below dismissed the exception, and the defendant moved for leave to appeal.

The Court rejected the motion.

Motion rejected.

VALLIÈRES & DRAPEAU.

Procedure—Interlocutory judgment—Pleading—Interest in suit.

The action was met by a plea to the effect that the plaintiff's *cédant* was insane at the time he made the *transport*; and, secondly, that the plaintiff Drapeau had no interest in the action and was only a *prête-nom*.

The plaintiff filed an answer-in-law, which was maintained, and the defendant moved for leave to appeal. This application was supported, with regard to the second point, by reference to C.C.P. 19.

The Court was of opinion that the judgment of the Court below was correct; that the debtor had nothing to do with the insanity of Mr. Saxe, who was not interdicted. The payment by the debtor to the *cessionnaire* of Saxe who was not interdicted, without fraud, was valid. Secondly, the defendant had nothing to do with the sincerity of the interest of Drapeau. (*See Robillard v. La Société de Construction*, 2 Legal News, p. 181.)

Motion for leave to appeal refused.

L'AINÉ & HAMEL.

Procedure—Interlocutory judgment—Appeal—Reference to Experts.

Action *en bornage*. The Court ordered an *arpenteur* to visit the place to establish whether, as it was pretended by defendant, a public highway intervened between his land and that of plaintiff, and if not, to make a report of the state of the premises to the Court. Leave to appeal from this judgment is sought by the defendant: 1st. Because the Court had no right to refer the case to an *arpenteur*, for that was to delegate its authority. 2nd. That if the *arpenteur* was to be considered as an *expert*, three and not one should have been named. (323 C. C. P.)

The Court was against the party moving. The Court below had a perfect right to make such an order to obtain information, and although generally the rule is to name three *experts*, this does not apply, and has never been held to apply to the nomination of an *arpenteur* on a question of *bornage*. (942, C. C. P.)

Motion rejected.

LESSARD & GENET.

Procedure—Appeal—Service.

Motion to reject appeal. It was urged that the appeal was taken after the delay granted by the Code, and that the Court had no jurisdiction to hear the appeal. The judgment was rendered on the 28th February, security was given on the 2nd April, and the petition was also served on the 7th April. It was also said

that the appeal was not served on the attorney in person, but at the clerk's office.

The appellant answered that the judgment from which appeal is taken was rendered in Review, that it reversed the judgment of the Court sitting in the District of Beauce, and that it was not registered in Beauce till the 30th March. It was therefore in time. (502 C. C. P.) The service on the attorney at his domicile is sufficient. (1148 C. C. P.) Appeal from judgments in Circuit differs in this respect from judgments in cases in the Superior Court (1123 C. C. P.)

The COURT was against the party moving on both questions. (*Bedard & Corporation*, 10 L. C. R., p. 429.)

Motion rejected.

DAWSON & McDONALD.

Procedure—Application to Court of Q. B. to appoint séquestre.

The respondent applied to the Court to name a séquestre under article 645 C. C. P.

The Court, without expressing any opinion as to whether the Court of Queen's Bench had jurisdiction to appoint a séquestre, refused the application on the ground that the application had been made in the Court below, that the application had been refused, and that no appeal had been taken from that judgment; and further that the application might be renewed in the Court below.

Motion refused.

PARADIS & LEMIEUX.

Procedure—Appeal.

The judgment in the Court below does not dispose of the case, either intentionally or by oversight.

The COURT was of opinion that from such a judgment appeal did not lie *de plano*.

Appeal dismissed.

COURT OF QUEEN'S BENCH

MONTREAL, January 27, 1883.

MONK, TESSIER, BABY and CARON, JJ.

HALL *ex-qual.* (plff. below), appellant, and LE MAIRE, etc., de MONTREAL (deft. below), Respondents.

Municipal Corporation—Responsibility for libel in pleadings—Prescription.

The prescription of one year, as to libel contained in a pleading, runs only from the date of the final judgment.

The judgment in appeal was as follows:

"Considérant que la présente action est une action intentée par feu J. K. Springle, maintenant représenté par les appelantes, demandereses en reprise d'instance, pour le recouvrement de dommages au montant de \$20,000 qui auraient été causés au dit J. K. Springle par une résolution des défendeurs intimés passée le 7 août 1868, et par une requête présentée par les dits défendeurs intimés devant la Cour Supérieure à Montréal, le 10 août 1868, demandant la destitution du dit J. K. Springle comme commissaire chargé de faire l'évaluation de l'indemnité à payer à l'Eon. Charles Wilson pour l'expropriation d'un terrain requis pour l'élargissement de la rue St. Joseph de Montréal;

"Attendu que la dite résolution et la dite requête contenaient des allégations injurieuses pour le dit J. K. Springle et de nature à faire tort à sa réputation et à ternir son caractère;

"Considérant que le dit J. K. Springle a contesté la dite requête ainsi présentée par les défendeurs intimés, le 10 avril 1868, devant la dite Cour Supérieure siégeant à Montréal;

"Considérant que jugement n'est intervenu en Cour de première instance sur cette requête et la contestation qu'en a faite le dit J. K. Springle, que le 17 septembre 1870, et que la dite Cour de première instance par son dit jugement a accordé les conclusions de la dite requête et renvoyé le dit J. K. Springle de ses fonctions, mais pour cause d'erreur de jugement seulement, résultant de fausses idées sur la loi d'expropriation, écartant comme non fondée les reproches injurieux faits au dit J. K. Springle dans la dite requête des défendeurs intimés;

"Considérant que le dit jugement du 17 septembre 1870, a été porté en appel devant cette Cour par le dit J. K. Springle le 14 juin 1871, et que cette Cour par son jugement du 20 septembre 1873, a déclaré que la dite Cour de première instance avait erré en destituant le dit J. K. Springle de sa charge de commissaire et a cassé le dit jugement du 17 septembre 1870;

"Considérant que les défendeurs intimés ont interjeté appel du dit jugement du 20 Septembre, 1873, à Sa Majesté en son Conseil Privé, et que ce dernier tribunal, par décret du 28 Novembre, 1876, a confirmé le jugement de

cette Cour, et donné gain de cause au dit J. K. Springle, prononçant ainsi un jugement final sur la requête contenant les allégations injurieuses dont s'est plaint le dit J. K. Springle dans son action en cette cause;

"Considérant que le dit J. K. Springle a institué la présente action le 4 Mai, 1871, pour dommages résultant d'allégations injurieuses faites dans la dite requête des défendeurs intimés, qui était alors encore pendante devant les tribunaux tant de première instance qu'en appel, et dont il n'a été finalement disposé que longtemps après l'institution de l'action, savoir par le dit décret de Sa Majesté en son Conseil Privé en date du 28 Novembre 1876, et que ce n'est qu'à compter de cette dernière date que le délit dont se plaint le demandeur dans son action, délit successif qui s'est renouvelé et perpétué depuis la date de la présentation de la requête devant la Cour de première instance, a complètement cessé, et que la prescription de l'action naissant de ce délit a commencé à courir;

"Considérant, partant, que dans l'espèce, il n'y a pas lieu à l'application des articles 2,262 et 2,267 du Code Civil concernant la prescription de l'action pour injures verbales ou écrites, non plus que de l'article 2,188 du dit Code, et, partant, que la Cour de première instance, en déclarant par le jugement dont est appel que l'action du dit J. K. Springle était absolument éteinte et prescrite lorsqu'elle a été intentée, et par suite non recevable, a mal jugé;

"Considérant qu'il est en preuve que ces allégations injurieuses ont causé au dit J. K. Springle des dommages considérables se montant à une somme d'au moins \$3,000;

"Considérant que les intimés n'ont en aucune manière prouvé ni justifié les dites allégations injurieuses au caractère du dit J. K. Springle;

"Cette Cour casse et annule le jugement rendu par la Cour Supérieure siégeant à Montréal le 31 Mai, 1880, et rendant le jugement que le dit tribunal aurait dû rendre, condamne les défendeurs intimés à payer aux appelantes, en reprise d'instance *ex qual.*, la somme de \$3,000 courant, avec intérêt, etc."

Judgment reversed.

Barnard, Monk & Beauchamp, for Appellant.

R. Roy, Q. C., for Respondent.

SUPERIOR COURT.

MONTREAL, April 30, 1883.

Before TORRANCE, J.

LARBAU V. LA COMPAGNIE D'IMPRIMERIE DE LA MINERVE.

Libel.

The plaintiff, a French Roman Catholic, on the eve of an election in which he was a candidate, was falsely charged in the defendant's newspaper with being a Freemason. The charge was calculated to injure, and did injure the plaintiff's candidature. Held, that he was entitled to recover damages.

The plaintiff, a practising advocate in the city of Montreal, was nominated as candidate in the electoral division of Rouville for the House of Commons on the 13th June, 1882, and the voting taking place on the 20th June, the result was that G. O. Gigault, the other candidate, was elected by a majority of 150 votes. On the 16th June the *Minerve* published an article headed "Soyez Franca," in the following words:

"Nous ne sommes pas de ceux qui dénoncent un candidat protestant, reconnu comme tel, parce qu'il est franc-maçon. Nous n'avons jamais songé à publier le portrait des candidats libéraux protestants avec les insignes franc-maçoniques. Mais nous avons le droit de dénoncer comme hypocrites ces candidats soi-disant catholiques qui se présentent dans des circonscriptions catholiques en cachant leur qualité de franc-maçons;

"Tel est le cas de M.M. Geoffrion, Poirier, Lafamme, et autres candidats rouges, membres de sociétés condamnées par l'autorité ecclésiastique.

"La *Patrie*, feuille maçonnique, n'a-t-elle pas été jusqu'à dénoncer faussement elle-même, il n'y a pas deux ans, des députés français comme franc-maçons, et ne dénonce-t-elle pas actuellement, les anglais orangistes à pleines colonnes?

"On ne peut être en même temps franc-maçon et catholiques, déclarait l'année dernière le journal *Le Monde Maçonnique*, organe attitré de la franc-maçonnerie.

"Notre *bug final*, disait encore la *Vente Suprême* du Carbonarisme Italien, est celui de *Voltaire et de la Révolution Française*.

"Il y a deux abominables, disait une autre autorité maçonnique, *le Roi et le Pape*."

"Que M.M. Huntington, Holton, Ward et

autres candidats libéraux anglais, soient francs-maçons, leur religion ne leur défend pas de l'être, et nous ne songeons pas à les attaquer à cause de cela. Mais nous avons le droit de demander à MM. Geoffrion, Poirier, Laflamme, Lareau, Robidoux, etc., ce qui en est à cet égard, pour ce qui les concerne, eux, candidats catholiques dans des comtés catholiques. Que ces messieurs soient francs-maçons ou membres de sociétés excommuniées, c'est leur affaire; mais qu'on le sache, et qu'il se donnent pour ce qu'ils sont, au lieu de se borner à dénoncer les protestants orangistes ou francs-maçons."

In the same number was an article headed "A propos de Francs-Maçons," beginning with these words:—"La Patrie est indignée parce que nous avons révélé le fait que MM. Geoffrion et Poirier, entre autres candidats rouges, sont Francs-Maçons." The plaintiff said that he was individually denounced as a Freemason in the above words. He also said that in the number of the *Minerve* of the 17th June the defendant made similar imputations against the plaintiff in an article headed: "Rouges et Francs-Maçons." The words were:—"Nous réaffirmons le fait que ces messieurs sont Francs-Maçons. Nous savons que l'organe rouge Maçonique, publié par le principal dignitaire français de l'ordre en Canada, se prépare à donner une déclaration du secrétaire général que MM. Geoffrion, Poirier et al. ne sont pas sur la liste." Plaintiff also complained that defendant in its number of the 19th June in the article headed "La Question de Franc-Maçonnerie" reiterated the imputation of Freemasonry against plaintiff. Further, that in the number of the 16th June, the defendant under the head "Les Sociétés Secrètes," where the oath of the Freemasons is given, insinuated maliciously that plaintiff was among them. He affirmed that this journal falsely, maliciously, for revenge and with premeditation, with the view of injuring plaintiff and ruining his credit and destroying his reputation with the public, and with the view of making him lose the confidence, the support and the votes of the electors of Rouville, published the foregoing injurious libel against plaintiff. That these imputations and libels were untrue; that the great majority of the electors of Rouville were Catholics, and plaintiff was a Catholic. That it was forbidden in the most formal manner by the Catholic religion to belong to the so-

ciety of Freemasons under penalty of excommunication and of exclusion from said religion; that Catholics considered it a crime to belong to the Freemasons and a Freemason to be unworthy of their confidence; that said libels had profoundly injured and humiliated plaintiff; that his good character, credit, respectability and honor had suffered, and said libels had done him irreparable wrong and alienated the support and votes of many electors of Rouville; that the *Minerve* and the numbers of the 16th, 17th and 19th June were circulated in the District of Montreal and the electoral district of Rouville, to the injury of plaintiff.

The defendant by its plea denied that it had affirmed that M. Lareau was a Freemason; it alleged that the federal elections were taking place; that the journals of the Liberal party, including M. Lareau, were denouncing the English Protestant Conservative candidates as Freemasons, and sought to excite the prejudices of Catholic electors against Catholic Conservative candidates because these had as chiefs or allies Protestant English Orangemen or Freemasons. That said articles were published in answer to the attacks of the Liberal press, and put the plaintiff and other Liberal candidates *en demeure* frankly to declare what their position was in relation to societies condemned by the Church; that the defendant was justified in putting this question to Liberal candidates, and was justified in mentioning as it had done the name of plaintiff, because he was one of the candidates of the Liberal party in Rouville; that the writings published by plaintiff and his party relations with the Institut Canadien Society to-day condemned by the Catholic Church, could justify the defendant to make upon the plaintiff the demand contained in the articles complained of.

PER CURIAM. There is no question as to the publication. Further, plaintiff was meant by the articles in question. Defendant says it only put a question to M. Lareau, and it had a right to ask the question and get an answer. The Court does not understand the words referring to M. Lareau as a mere question. They are plainly an accusation that he belonged like other men named to the proscribed order of Freemasons. At the beginning of the article headed "Soyez Francs," we find a denunciation as hypocrites of candidates presenting themselves and hiding

their quality of Freemasons: "Tel est le cas de MM. Geoffrion, Poirier, Lafamme et autres candidates rouges, membres de sociétés condamnées par l'autorité ecclésiastique." It goes on to say, "Nous avons le droit de demander à MM. Geoffrion, Poirier, Lafamme, Lareau, Robidoux, &c., ce qui en est à cet égard, pour ce qui les concerne, eux, candidats catholiques, dans des comtés catholiques. Que ces messieurs soient francs-maçons ou membres de sociétés excommuniées, c'est leur affaire, mais qu'on le sache, et qu'ils se donnent pour ce qu'ils sont," &c. The only suggestion of a question here is in the words, "qu'on le sache," and "qu'ils se donnent pour ce qu'ils sont." But the idea thrown out conspicuously at the beginning is that M. Lareau among others mentioned is a member of societies under the ban of the church. The same idea is unmistakably put forth in the article headed "A propos de Francs-Maçons," beginning with the words, "*La Patrie* est indignée parce que nous avons révélé le fait que MM. Geoffrion et Poirier, entre autres candidats rouges, sont Francs-Maçons." The article of the 16th was circulated in the County of Rouville on Saturday, the 17th, and there is the evidence of credible electors, both Conservative and Liberal, that they understood that the charge was made against M. Lareau that he was a Freemason. We have also unquestionable evidence as to the reputation of Freemasons in the Catholic counties and in Rouville. In a word, the reputation is bad. The country people regard them with horror, says a witness. The explanation is easy to find. Freemasons are under the ban of the church, and it is universally known. If the evidence were wanted, it is found in the deposition of Messire Joseph de Repentigny, Vicar of Montreal. The effect of the articles in question was most prejudicial to the plaintiff as regards his candidature. Was the accusation true? There was not a word of truth in it. Therefore the defendant should pay damages. These are assessed at \$400.

Lebeuf for the plaintiff.

Lacoste & Co. for defendant.

SUPERIOR COURT.

MONTREAL, May 12, 1883.

Before RAINVILLE, J.

LAMBE es-qual. v. THE ONTARIO BANK.

Provincial powers of taxation—Tax on Banks—
45 Vict. (Que.) ch. 22.

1. *The tax imposed on Banks by 45 Vict., ch. 22 (Que.) is an indirect tax.*
2. *The tax in question is on the franchise, and as regards a Dominion corporation of which the shares are only owned in part by persons within the province, is not taxation within the province.*
3. *The tax is an interference with the exclusive power of the federal legislature to regulate Banks and the incorporation of Banks.*

The judgment is in the following terms:

"La cour, etc....

"Attendu que le demandeur es-qualité d'inspecteur de licences pour le district de revenu de Montréal, réclame pour et de la part de Sa Majesté, la somme de \$1,300, étant pour taxes imposées sur la défenderesse en vertu de l'acte de la législature de Québec, 45 Vict., ch. 22;

"Attendu que le demandeur allègue que la défenderesse est une banque incorporée; qu'elle a un capital d'un million et demi de piastres, qu'elle fait des affaires de banque dans les limites de la province de Québec, et qu'elle a un bureau d'affaires en la cité de Montréal, dans le district de Montréal;

"Attendu que la défenderesse plaide qu'elle existe en vertu d'un acte du Parlement de la Puissance du Canada (34 Vict., ch. 5), et des actes l'amendant, que sa place principale d'affaires est à Toronto dans la province d'Ontario, que plus des deux tiers de son capital sont employés dans la dite province d'Ontario, et un tiers seulement dans la province de Québec; que d'après les pouvoirs à elle conférés, par le dit Parlement de la Puissance, la défenderesse a établi plusieurs bureaux d'affaires dans les différentes provinces qui composent la Puissance; que la taxe imposée et réclamée est illégale et inconstitutionnelle, et que la législature de la province de Québec n'avait pas le droit de l'imposer,

10. Parce qu'elle n'est pas une taxe directe;

20. Parce qu'elle n'est pas imposée dans les limites de la province;

30. Parce qu'elle est un empiètement sur les droits du Parlement fédéral de régler le commerce et le trafic et les banques et l'incorporation des banques;

"Considérant que les faits allégués de part et d'autre sont admis par les parties par une admission signée par elles;

"Considérant que la taxe réclamée est imposée sur le droit corporatif (franchise) et leur

privilege de transiger des affaires dans la province de Québec, et non sur la propriété de la banque;

"Considérant que par la loi les banques ont en ce pays le monopole de faire des affaires de banque, et qu'en définitive la dite taxe devra toujours être supportée par le public, et qu'en conséquence elle est indirecte ;

"Considérant que la dite taxe sera supportée en définitive par des personnes résidant pour la plupart en dehors de cette province, et que le droit corporatif (franchise) n'est pas situé en entier en cette province, et qu'en conséquence la dite taxe n'est pas imposée dans les limites de cette province ;

"Considérant que par l'Acte de l'Amérique Britannique du Nord de 1867, le pouvoir exclusif de régler les banques et l'incorporation d'icelles est attribué au Parlement fédéral ;

"Considérant que le dit Parlement a exercé ses pouvoirs à cet égard, qu'il a créé la dite banque défenderesse en cette cause, et lui a permis d'établir des bureaux ou places d'affaires dans tous endroits quelconques dans les limites de la Puissance ;

"Considérant que les législatures provinciales n'ont le droit de taxer directement que ce qui existe par leur autorité ou ce qui est introduit par leur permission ;

"Considérant que les banques ne sont ni créées par leur autorité ni introduites en cette province par leur permission ;

"Considérant que le pouvoir de taxer des législatures provinciales est illimité, dans leur sphère ;

"Considérant que si le pouvoir de taxer les banques leur était reconnu, elles auraient droit de les taxer de manière à les faire disparaître et à annihiler les pouvoirs exclusifs du Parlement fédéral dans cette matière, et qu'en conséquence la dite taxe est un empiétement sur les droits du Parlement fédéral de régler les dites banques et de les incorporer ;

"Maintient l'exception plaidée par la défenderesse, déclare la dite loi *ultra vires* et inconstitutionnelle quant à la dite défenderesse, et déboute le demandeur es-qualité de son action ;

"Et la Cour recommande que les frais et dépens de la défense soient payés à la défenderesse."

Lacoste & Co., for the plaintiff.
Girouard, Q.C., counsel.
Abbott & Co., for defendant.

COUR SUPERIEURE.

MONTRÉAL, 16 avril 1883.

Coram JETTÉ, J.

LA COMPAGNIE D'ASSURANCE MUTUELLE DU FEU
DU CANADA V. ALPHONSE BASTIEN.

Compagnie d'Assurance Mutuelle—Action sur billet de prime.

Le défendeur poursuivi sur un billet de prime par la demanderesse, Compagnie d'Assurance Mutuelle de la Province d'Ontario, fait motion avant de plaider, que la compagnie demanderesse soit tenue de produire devant la Cour :

1o. Des extraits ou copies de toutes les résolutions votées par les directeurs depuis l'émission de la police du défendeur jusqu'à son expiration, déclarant des répartitions sur les membres de la compagnie ;

2o. Des extraits ou copies des formalités observées pour la convocation des directeurs aux assemblées ou réunions auxquelles ces résolutions ont été passées ;

3o. Le montant des pertes encourues par la demanderesse, pendant la durée de la police du défendeur ;

(Les items 4 et 5 furent abandonnés.)

6o. Des extraits ou copies des avis des répartitions au défendeur, lesquels documents devaient être produits sous tel délai qu'il plaira à la Cour de fixer.

Cette motion fut appuyée d'un affidavit du défendeur alléguant qu'il n'a jamais eu avis des assemblées générales de la compagnie, ni des répartitions faites par elle, qu'il n'a jamais eu communication des livres ni d'aucun rapport des affaires de la demanderesse.

La Cour a accordé cette demande, et a condamné la demanderesse à produire sous le délai d'un mois les documents demandés par la motion, avec dépens contre la demanderesse. *

Longpré & David pour la demanderesse.

L. Demers pour le défendeur.

(J. J. B.)

* Un jugement semblable a été rendu en décembre dernier par l'Honorable Juge Bélanger à Beauharnois, dans la cause de "*Beaver Mutual Fire Insurance Company of Toronto*" v. *Noé Legault*.

SUPERIOR COURT.

MONTREAL, April 30, 1883.

Before LORANGER, J.

PINBONNEAULT v. DE GASPÉ, and E. Contra.

Incidental demand, Service of.

The incidental demand in this case was made as follows: Immediately at the conclusion of the plea the defendant opened the incidental demand: "And the said defendant hereby constituting herself incidental plaintiff, complains of plaintiffs, now incidental defendants, and declares, &c." This demand was served on the plaintiff's attorneys and filed with the pleas.

The plaintiffs as incidental defendants filed an exception to the form on the following grounds:—

1. Parceque la dite demande incidente n'a jamais été légalement signifiée tel que requis par la loi.

2. Parceque la signification faite par l'huissier de la demande incidente sur Messrs. Judah & Branchaud est illégale, nulle, et de nul effet.

3. Parceque la signification de la dite demande incidente n'a jamais été faite aux défendeurs incidentes tel que requis par la loi.

The Court considered the incidental demand properly made and served, and accordingly dismissed the exception with costs.

Judah & Branchaud for plaintiffs and incidental defendants.

Monk, Monk & Raynes for defendants and incidental plaintiffs.

RECENT DECISIONS, P.Q.

Procedure—Report of Distribution—Hypothec.

—It is not competent to hypothecary creditors, who have not been collocated in a report of distribution duly homologated, of the monies arising from a sheriff's sale of the real property hypothecated in their favor, to sue to recover from a party alleged to have been illegally collocated in such report, on the ground that according to the Registrar's certificate attached to the sheriff's return, such party ought not to have been so collocated, and that plaintiffs should have been collocated for the amount of their demand preferentially to him.—*McDonell v. Buntin*, 27 L. C. J. 73.

Hypothec.—Where a hypothecary creditor cedes his right of preference on the monies

arising from the sale of a portion of the property hypothecated, in favor of a hypothecary creditor, who is only third in rank, such creditor having first rank cannot afterwards claim to rank for his full claim (without deduction of the monies received under said sale), to the prejudice of a hypothecary creditor, who is second in rank, in the distribution of monies arising from the sale of the balance of said property.—*Perodeau & Quintal*, 27 L. C. J. 74.

Master and Servant.—When a commercial traveller, engaged by the year, quits the service of his employer without legal cause and against the will of his employer, and without previous legal notice, he forfeits all claim to wages accrued to the time of his quitting said service.—*Nixon v. Darling*, 27 L. C. J. 78.

GENERAL NOTES.

The Affirmation Bill was defeated in the House of Commons, May 4, the Government being beaten on the division.

There may be seen on St. Paul street, Baltimore, the sign of Charles J. Bonaparte, Attorney-at-law, a grand nephew of the great Napoleon. He is an active member of the profession and is considered an able and eloquent advocate.—*Chicago Legal News*.

The following is an extract from a report of a wife-beating case in one of the London police Courts:—John Smith, witness for prosecution, is under examination. "Now, what do you know of the matter, Mr. Smith?" "I know everything. I seed Brown beat his wife." "How did he beat her?" inquired the magistrate, "How did he beat her?" exclaimed the witness with a look of scorn, "how would you beat your wife?" The magistrate desired the witness to answer the question. "Well," said the witness at length, "Brown uses his boots, as I never do. I only uses my fists. I have often told him those here boots would get him into trouble!"

BAR OF MONTREAL.—The following are the office-bearers elected for 1883-4:—Bâtonnier, C. A. Geoffries; Syndic, J. E. Robidoux; Treasurer, M. M. Tait, Q.C.; Council: S. Bethune, Q.C., L. R. Church, Q.C., C. C. de Lorimier, Q.C., F. L. Béique, R. Laflamme, Q.C., A. Lacoste, Q.C., W. W. Robertson, A. H. Lann; Secretary, A. E. Poirier.

ST. FRANCIS.—The office-bearers elected for the current year are as follows:—Bâtonnier, Wm. White; Syndic, J. A. Camirand; Treasurer, L. E. Panneton; Secretary, H. W. Mulvena; Council, J. W. Merry, S. B. Sanborn, H. C. Cabana.

QUEBEC.—The office-bearers are as follows:—Bâtonnier, J. G. Bossé, Q.C.; Syndic, C. B. Langlois; Treasurer, D. J. Montambault; Secretary, R. J. Bradley; Council, G. Irvine; F. Langelier, J. Malouin, Andrews, Morrisette, Dunbar, Jules Larue, Jean Blanchet.

The Legal News.

Vol. VI.

MAY 26, 1883.

No. 21.

THE AFFIRMATION BILL.

We cut from the *Morning Post* of the 10th inst. a letter which exposes completely, and in a few words, the fallacy that an Affirmation Bill should be passed on the principle of religious toleration. The Affirmation Bill is really an outburst of intolerance, by those who are advocating it violently; but many well-intentioned people are misled by the idea that it is a question of conscience. Affirmation or oath can only be a form for those who do not believe in any moral government of the world. Courts of justice have long permitted people to swear in any form they believe to be binding. The test is not the *form* of the affirmation, but whether the person swearing has any moral sense of duty.

Mr. Bright's idea of the question is logically less absurd than Mr. Gladstone's. Mr. Bright would have no form at all, because the obligation to speak the truth on all occasions being absolute, using a form, call it oath or affirmation, on some occasions and not on all, is to make a distinction between the kinds of truth. It is unnecessary to expose the various errors theoretical and practical involved in Mr. Bright's eccentric proposition, for it presents no real danger at present. The peril is from the sleight of hand, by which one case bearing an outward resemblance to another and totally different one, is substituted for it. The spread of a low class of education gives opportunity for these enterprises by which crafty politicians live. The letter is as follows:

TO THE EDITOR OF THE MORNING POST.

SIR,—With regard to the above—1. Atheists already find their way into the House; therefore they suffer under no political disability; therefore they need no relief bill. 2. Roman Catholics would have had to abjure the Pope; Jews to declare themselves Christians; Quakers to take an oath which they considered sinful; therefore they were relieved. The atheist is not required to call himself a theist; he does not consider it sinful to take an oath; there is therefore no analogy. 3. Mr. Bradlaugh himself considers

the words of the oath "meaningless;" he has since expressed his willingness to use them; therefore he can have no scruples of conscience in the matter. What can the word "conscience" mean to an atheist?

From all this may we not conclude (1) that the Affirmation Bill could only be a Bradlaugh Relief Bill, there being nobody else to relieve; (2) that there is no political principle of religious toleration involved; (3) that Mr. Bradlaugh is not excluded from the House for his opinions, but for the use he made of them to insult the convictions of the majority of his fellow-countrymen; (4) that the Premier wasted a good many words. Perhaps this last is not a novel conclusion.

Yours respectfully,

May 8.

R. N.

THE KRING CASE.

A correspondent of the *N. Y. Herald*, in noticing the death of Charles F. Kring at St. John's Hospital, St. Louis, refers to the singular criminal record connected with the deceased. He had undergone five trials for the same crime. In 1875 he murdered Dora Boemser, the wife of his partner. His first trial commenced December 20th, 1875. He was convicted of murder in the first degree. During the taking of testimony he was handcuffed for a violent outburst of temper. On the ground that he was shackled before the jury a new trial was granted and the sentence of death set aside. In May, 1878, he was again tried. During this hearing one of the jurors was taken sick suddenly and a new trial resulted. The jury which heard the testimony on the third trial, in January, 1879, disagreed and were discharged. Under an arrangement made with Acting Circuit Attorney Ladue, in 1879, Kring pleaded guilty to murder in the second degree and was sentenced to twenty-five years in the penitentiary. The defence claimed that the plea was entered under an agreement to take ten years, and he was allowed to withdraw his plea to murder in the second degree by the Supreme Court and plead not guilty to murder in the first degree. When next arraigned he refused to plead at all, and the Court ordered him to trial under a plea of not guilty of murder in the first degree. This trial resulted in a conviction and sentence of death, but a stay was granted by Judge Sherwood, of the State Supreme Court,

just twelve hours before the hour set for the execution. The case was then taken to the State Supreme Court on a question of *ex post facto* law. The trial court verdict was affirmed. A writ of error was granted by Mr. Justice Miller, of the United States Supreme Court, and when the case was called and argued before that tribunal last March, the judges reversed the decision, the majority holding that as Krings had once been allowed to plead guilty to murder in the second degree he could not again be placed in jeopardy for a higher grade. Krings was admitted to bail in the sum of \$3,000. These trials have cost the State over \$10,000, and Krings' father, it is said, has spent \$40,000 for the defence. Krings had been nearly eight years in prison before his admission to bail.

NOTES OF CASES.

COUR SUPÉRIEURE.

MONTREAL, 9 mai 1883.

Coram MATHIEU, J.

ARMSTRONG et *vir* v. TRUDEL et al., & TRUDEL, Demandeur en garantie, v. JOHNSON, Défendeur en garantie.

Péremption d'instance.

Les pourparlers et arrangements, ou projets d'arrangements entre les parties ont pour effet d'interrompre la prescription, s'ils sont légalement établis.

PER CURIAM.—“Attendu qu'il appert que le dernier procédé fait en cette cause, savoir la production des réponses de la demanderesse aux articulations de faits du défendeur en garantie, a été fait le 27 mars 1880 ;

“Attendu que le 18 novembre 1881, le procureur de la demanderesse, Edmond Lareau, a proposé au procureur du défendeur en garantie des arrangements, savoir que la demanderesse retirerait de son action si le défendeur en garantie consentait à payer les frais de la dite demanderesse sur la dite action ;

“Considérant qu'il appert que le même jour, 18 novembre 1881, le procureur du dit défendeur en garantie répondit qu'il acceptait ces propositions si la demanderesse voulait donner au défendeur en garantie, une quittance ainsi que le frère de la demanderesse ;

“Considérant que plusieurs lettres paraissent avoir été échangées depuis cette date du 18 novembre 1881 entre les parties jusqu'au 21

octobre 1882, jour où le procureur du dit défendeur en garantie écrivit au procureur de la dite demanderesse, Edmond Lareau, l'informant qu'il considérait que la prescription du droit de la demanderesse était acquise hors de tout doute et qu'il laisserait la cause suivre son cours ;

“Considérant que les pourparlers qui ont eu lieu sont suffisants pour constituer une interruption de la péremption, vu qu'il résulte des lettres des procureurs des parties en cette cause produites au dossier, que les poursuites n'ont été discontinuées entre le 18 novembre 1881 et le 21 octobre 1882, que par suite des arrangements proposés entre les dites parties ;

“Considérant que l'espace de temps depuis le dernier procédé, savoir le 27 mars 1880 jusqu'au jour de la signification de la dite motion pour péremption, savoir le 17 d'avril 1883, n'est pas suffisante, sans comprendre le temps où les dits pourparlers ont eu lieu, pour acquiescer au défendeur en garantie la péremption qu'il demande ;

“A renvoyé et renvoie la motion du défendeur en garantie, avec dépens distraits à Messrs. Lareau & Lebeuf, avocats de la dite demanderesse ; et a maintenu et maintient la motion de la dite demanderesse avec dépens, etc.”

Autorités citées par les demandeurs :—Troplong, vol. 1, Presc., No. 47 ; Sirey, Proc. Civ., art. 399, Nos. 69, 74 ; Merlin, Rep. vo. Péremption, Sec. 1, § 2, No. 8 ; Pigeau, Proc., vol. 1, p. 471, 484 ; Carré, No. 1,419 ; Favard, 70. Péremption, vol. 1, p. 612 ; Dalloz, Rep. vo. Péremption, 21 L. C. J., p. 221 ; C. P. C., art. 451.

Lareau & Lebeuf, avocats de la demanderesse.
R. A. Ramsay, avocat du défdr. en garantie.

SUPERIOR COURT.

MONTREAL, March 31, 1883.

Before JETTE, J.

LYMAN *ex* qual. v. McDIARMID, and TAYLOR et al., T. S., and Plaintiffs contesting.

Landlord and tenant—Saisie-arrest.

Where a tenant who was insolvent, fraudulently transferred his stock-in-trade to one of his creditors, a saisie-arrest avant jugement issued by the landlord in the hands of the said creditor, within eight days from the removal, was maintained for the amount of rent due and to become due under the lease, the effects being subject to the landlord's lien for rent.

It appeared that the defendant leased a shop from plaintiff's agents for the term of two years.

Before the expiration of the first year the defendant abandoned the premises without giving notice to the landlord's agents, and made a transfer of all his stock in trade to one of his principal creditors (the present *Tiers Saisi*.) The landlord's agents thereupon, and within the eight days immediately following the transfer, issued a *saisie-arrêt avant jugement* in the hands of said creditor; and subsequently contested his declaration that he was not indebted to defendant, on the ground that the transfer so made was fraudulent, and that the *Tiers Saisi* well knew defendant to be insolvent at the time of the transfer; basing their right of contestation on the fact that they had a lien and *droit de rétention* on the effects so transferred for the amount of rent due and to become due under the lease.

Upon proof it was established that the goods transferred were of sufficient value to cover the amount claimed; that the defendant was notoriously insolvent, of which the *Tiers Saisi* had certain knowledge, and that although the transfer had been made with the understanding between the defendant and the *Tiers Saisi* that the latter was to divide the proceeds of the sale of the effects *pro rata* with the other creditors, no such division had been effected, and no provision had been made to guarantee the landlord for the rent so claimed.

The conclusions of the judgment of the court are as follows: "Considérant, etc., etc., déclare la *saisie-arrêt* prise entre les mains du dit tiers-saisi bonne, valable et tenante, maintient la contestation faite par les demandeurs de la déclaration du dit tiers-saisi; déclare nulle et de nul effet la prétendue vente des marchandises du défendeur au tiers-saisi invoquée par ce dernier, reconnaît le droit de gage et le privilège des demandeurs sur les dites marchandises, pour le paiement de leur dite créance de \$264.26, pour loyers et accessoires, et en conséquence enjoint et ordonne au tiers-saisi de livrer et remettre entre les mains de l'huissier qui sera chargé de l'exécution du présent jugement, et de celui rendu dans l'instance en *saisie-gagerie* susdite, toutes les dites marchandises par lui reçues du défendeur, les 17 et 19 janvier 1882, comme susdite, pour par les demandeurs faire procéder à la vente d'icelles, en vertu de leur dit jugement obtenu contre le défendeur dans leur instance en *saisie-gagerie*

sus-mentionnée; et exercer sur le produit d'icelles leur privilège pour le montant de leur dite créance de \$264.26, avec intérêt et dépens, et à défaut par le défendeur de remettre et livrer les dites marchandises comme susdite sous quinze jours de la présente sentence, et aussitôt que mis en demeure de ce faire par l'huissier comme susdit; condamne purement et simplement le dit tiers-saisi à payer aux demandeurs la dite somme de \$264.26, avec intérêt du 28 janvier 1882, date de l'assignation, et condamne dans tous les cas le tiers-saisi aux dépens encourus sur la présente *saisie-arrêt* et contestation, desquels dépens distraction est accordée à M^{rs} Dunlop & Lyman, avocats et procureurs des demandeurs."

Dunlop & Lyman, for Plaintiffs.

McMaster & Co., for T. S.

(R. T. H.)

CIRCUIT COURT, TERREBONNE.

STE. SCHOLASTIQUE, March, 1883.

Before BÉLANGER, J.

JASMIN v. THE CANADIAN PACIFIC RAILWAY Co.

Railway—Animals killed on track.

Held:—1. *That a railway company is not responsible for the killing of animals straying and trespassing on its track.*

2. *That where a proprietor allows a road across his land, and the gate opening from it to the track, to be used by the public as a thoroughfare, he will be responsible for the acts of the persons using the road, and the railway company will not be held responsible for the bad condition of the gate, and for the killing of animals passing through it on to the track.*

This was an action to recover from the Company, defendants, the value of certain cattle killed upon its track by a passing train. The judgment which follows sets out fully the circumstances of the case, and the grounds of the decision:—

PER CURIAM. Le demandeur allègue que depuis plus d'un an il est propriétaire d'une terre dans Ste. Thérèse, traversée par l'embranchement du chemin de fer allant de Montréal à St. Jérôme, et actuellement la propriété de la défenderesse.

Que le 14 septembre dernier (1882), entre six et huit heures du soir, au moment où un convoi de la défenderesse, se rendant à St. Jérôme,

traversait la propriété du demandeur, deux vaches, une taure et un taureau du demandeur se trouvaient sur la voie du dit chemin, y étant parvenus par le défaut de barrière et par le mauvais état de la clôture de la défenderesse vis-à-vis de la dite terre; que deux vaches ont été tuées du coup par le dit convoi, l'autre a eu les pattes cassées et est morte deux jours après, et le taureau a eu les reins cassés, ce qui lui a ôté sa valeur; que cet accident a été causé par la négligence de la défenderesse et de ses employés, qui ont négligé d'entretenir les clôtures et les barrières le long de la voie ferrée sur la dite terre, et que nommément une des barrières communiquant au parc où se trouvaient les animaux du demandeur était brisée, au point de permettre aux dits animaux de passer, et que de fait ils sont passés par cette barrière; que la valeur des trois vaches est de \$25 chacune, et celle du taureau de \$15, formant \$90, que le demandeur réclame de la défenderesse.

La défenderesse a plaidé qu'il est faux que la clôture et les barrières fussent en mauvais ordre, et qu'au contraire, la défenderesse les a toujours tenues en bon ordre; que lors du prétendu accident, les animaux du demandeur étaient errant et *trespassing* sur le chemin de la défenderesse, par le fait du demandeur, par sa faute et sa propre négligence, et que si ces animaux sont passés par la dite barrière, ce n'est pas par la faute et la négligence de la défenderesse et de ses employés, mais bien celle du demandeur, et de ses agents et ses représentants; et que le demandeur était dans l'habitude de permettre volontairement, imprudemment et par négligence, à ses animaux, d'errer et d'aller chercher leur nourriture sur le chemin de la défenderesse; que la défenderesse n'est pas responsable des dommages réclamés par le demandeur. A ce plaidoyer elle a ajouté une défense en fait.

La preuve établit que le chemin de fer traverse la terre du demandeur; et que le 14 septembre au soir, deux vaches et une taure du demandeur ont été tuées, et un taureau blessé sérieusement par le convoi se rendant à St. Jérôme. La question est de savoir si la défenderesse est responsable envers le demandeur de la mort de ces animaux. Cette responsabilité ne peut être rejetée sur elle; toutefois, vu que c'est par sa négligence et sa faute que les animaux se trouvaient sur la voie du chemin de fer

lors de l'accident. Les animaux sont sortis sur la voie ferrée par une des barrières servant à communiquer du parc du demandeur à l'autre partie de sa terre, à travers le chemin de fer. D'après la preuve, ils sont passés par une ouverture pratiquée dans cette barrière au moyen de deux barreaux cassés; ces barreaux avaient été remplacés une couple de fois depuis au-delà d'un an par d'autres barreaux, et le printemps dernier par une planche clouée vis-à-vis le trou. Plusieurs fois cette planche avait été trouvée déclouée et tombée à terre par les employés de la défenderesse, et chaque fois ils l'ont reclouée, et le jour de l'accident il paraît que cette planche était à terre. Nous ne savons comment il arrivait que cette planche était si souvent enlevée de la barrière, si ce n'est que beaucoup de personnes passaient par cette barrière pour se rendre à travers la terre du demandeur, à la Côte St. Louis, et que ces personnes, en ouvrant et fermant cette barrière, en faisaient tomber la planche, qu'ils avaient soin de ne pas remplacer; car il est difficile de supposer que c'était les animaux qui la faisaient tomber, vu qu'elle était clouée du côté du parc. Si cette supposition est raisonnable, et je crois que c'est la seule qui, d'après la preuve, offre quelque plausibilité, je ne vois pas comment la défenderesse peut être tenue responsable de l'accident en question. Le demandeur est responsable des actes de toutes les personnes qui passaient par cette barrière, et qui en déclouaient ou faisaient tomber la planche, tout comme si c'eût été son propre fait ou celui de ses employés. Légalement parlant, et même d'après la preuve, le demandeur devait connaître et connaissait depuis longtemps l'état de cette barrière, et néanmoins il ne s'en est jamais plaint, et il n'en a jamais averti les employés de la Compagnie, malgré qu'il fût de son devoir de le faire. Ses deux filles nous disent que depuis huit jours elles passaient par l'ouverture dans la barrière, en allant et en revenant traire leurs vaches, et néanmoins jamais aucune plainte n'a été faite aux employés de la défenderesse. Il est même prouvé que nombre de fois les animaux du demandeur ont été trouvés sur la voie ferrée, et les employés l'ont plusieurs fois averti de ne pas mettre ses animaux sur la voie ferrée, et jamais le demandeur ne s'est plaint de la barrière ou des clôtures.

Une des raisons données par le Juge Badgley,

en appel, pour renverser le jugement de la Cour Supérieure et débouter l'action dans la cause de "The Champlain and St. Lawrence Railway Company," appelante, and Désange Simard, intimée, était celle-ci : "It is also in evidence that the hay growing on defendants' railroad was a great temptation to the plain-tiff's animals to stray, and that L'Heureux, her son-in-law, one of the witnesses, allowed them to stray on the defendant's road, which, of course, saved his own forage." Et plus loin : "They (the appellants) could not be compelled to make a special construction for protection against vicious horses; nor under those statutory requirements should the defendants be compelled to pay for the loss, not only of hogs, sheep or cattle, but of horses which she or her employés taught to stray from her own alleged property upon that of the defendants."

Redfield, à la note en bas de la page 196, rapporte plusieurs jugements rendus aux Etats-Unis, qui ont décidé que : "A railway company is not bound to resort to any extraordinary means to insure the fences being kept up along its line night and day; reasonable diligence is all that is required."

Si les employés ont été négligents à tenir cette barrière en bon ordre, je crois que le demandeur l'a été bien davantage en la laissant briser par les personnes qu'il y laissait passer, et en la laissant ainsi ensuite dans cet état un temps indéfini sans la réparer lui-même, sans jamais s'en plaindre à la défenderesse ou ses employés; et je crois que si l'accident est arrivé, le demandeur peut s'en attribuer en plus grande partie la faute, et que, sous les circonstances, il a mauvaise grâce de se plaindre de la défenderesse et de ses employés.

L'action est déboutée avec dépens.

Prevost & Mathieu, for plaintiff.

H. Abbott, for defendants.

Champagne, counsel.

CIRCUIT COURT.

DISTRICT OF IBERVILLE, May, 1883.

Before CHAGNON, J.

DON V. ROE.

Tithes, Responsibility for.

A person who purchases unthreshed grain which is subject to tithes does not become thereby respon-

sible for the payment of the tithe, nor by the fact of his threshing and fanning the grain. The responsibility rests on the owner or occupant of the land who harvested the crop.

PER CURIAM. Le demandeur réclame la dime d'une certaine quantité de grains, que le défendeur aurait achetés, en grange et non battus, d'un nommé Chouinard de St. Valentin, récoltés par ce dernier sur une terre qu'il possède à St. Valentin.

Le défendeur réside dans la paroisse de St. Oyprien.

Le défendeur prétend qu'il ne doit aucune dime au demandeur, qu'il n'a nullement récolté le grain dont il est question, qu'il n'a fait que l'acheter, et que son achat n'a pu l'assujétir au paiement de la dime.

Le demandeur se fonde principalement, pour soutenir son action, sur un jugement rendu par la Cour du Banc du Roi, en 1808, dans une cause de Messire Robitaille contre Ignace Lamarre, et dans laquelle action Messire Robitaille réclamait sa dime sur des grains récoltés par le défendeur sur sa propre terre, en même temps que sur des grains achetés par lui sur pied du nommé J. B. Lamarre, et aussi sur une autre quantité de grains non battus mais engrangés par le dit Jean B. Lamarre, et vendus ainsi, en grange, au défendeur.

Le jugement rendu par la Cour du Banc du Roi dans cette cause, a condamné le défendeur à payer non seulement la dime des grains récoltés par lui sur sa propre terre et sur celle de J. B. Lamarre, mais aussi celle des grains achetés par le défendeur du dit J. B. Lamarre, en grange.

La présente cause soumet à la cour une semblable question : Celui qui achète du grain, non battu et sujet à la dime, devient-il par le fait même, obligé personnellement au paiement de la dime ?

Je crois que nulle part on ne voit cette responsabilité imposée à l'acheteur, qui n'a pas récolté, c'est-à-dire qui a acheté le grain séparé du sol, auquel il tenait. C'est le possesseur, savoir celui qui recueille, que la loi a toujours chargé de cette responsabilité.

Lorsque la dime se payait en gerbes, c'était le détenteur de l'héritage qui était obligé, avant d'enlever sa récolte, de notifier le Curé de venir chercher sa dime en plein champ; et depuis cette époque, c'est-à-dire depuis que la quotité

de la dime a été changée de la 13^e à la 26^e portion, à la condition que l'habitant battit et vannât le grain et le portât au presbytère, la responsabilité n'a pas cessé de reposer sur le propriétaire de la terre, qui a produit le grain et fourni la récolte, ou sur le fermier, suivant le cas.

C'est que la dime est une charge des fruits, et doit être payée par celui qui perçoit les fruits. "Percevoir" signifie "recueillir" et "recueillir" veut dire "récolter."

Celui qui achète et paie ce qu'il achète, ne perçoit pas. L'acheteur n'a pas recueilli les fruits qu'il achète sur une terre quelconque; il n'a pas récolté ces fruits sur aucune terre dans le territoire affecté à la dime du Curé.

Il est bien vrai que, pour avoir acheté le grain en grange, il a dû se trouver dans l'obligation de le battre et vanner, si toutefois il ne l'a pas vendu lui-même, en grange, mais ce n'est pas le battage et le vannage, qui crée l'obligation de la dime; c'est la cueillette des fruits, ou la récolte faite sur une propriété dans le territoire.

L'obligation de vanner, battre et porter le grain au presbytère n'a été qu'une obligation additionnelle, à laquelle le paroissien a été assujéti, en considération du fait que la dime était réduite au 26^e minot. C'est un ajouté fait à ce que la loi requérait ci-devant, pour créer l'obligation, mais qui n'a rien dérangé du principe sur lequel reposait le paiement de la dime, savoir la charge du soutien du Curé par le possesseur, ou dans tous les cas par le paroissien de l'héritage au moyen du paiement de la dime.

Guyot, Vo. Dixmes. "Dixmes: c'est une portion des fruits de la terre, ou des troupeaux, que doivent les possesseurs des héritages ou des troupeaux aux décimateurs."

Même auteur Vo. Bail art. 46. "Ce n'est jamais le propriétaire (dans le cas de bail) qui doit acquitter la dime et il est facile d'en apercevoir la raison; c'est que la dime n'est pas une charge du fonds et qu'elle n'est due que sur les fruits en vertu d'une coutume qui a passé en obligation: or comme c'est le locataire qui perçoit les fruits, c'est lui qui est tenu d'acquitter la dime."

Quelques auteurs ont prétendu que l'institution de la dime était de droit divin, et d'autres, qu'elle appartenait au droit positif, en ce que l'obligation en avait été créée par les Edits et Ordonnances des Rois de France, et on citait entr'autres l'ordonnance de Blois.

Or Lacombe, dans son Dictionnaire, Vo. Dixmes, parle de l'arrêt de règlement du 12 Juin 1713, qui a ordonné l'exécution de l'art. 49 de cette ordonnance comme suit: "Arrêt de règlement, 12 Juin 1713, ordonne l'exécution du dit art. 49, et que tous détenteurs d'héritages sujets à dixmes seront tenus de faire publier et afficher le jour pris pour déponiller et enlever les fruits, le dimanche, ou fête prochaine précédant le dit jour; défend de mettre en gerbe, enlever les fruits, sans avoir préalablement payé ou laissé le dit droit de dixme, à la raison, nombre et quantité qu'il a accoutumé d'être payé, le tout à peine de confiscation au profit des ecclésiastiques, de tous les grains et fruits ainsi déponillés, des chevaux et harnois de ceux (c'est-à-dire de ceux des dits détenteurs d'héritages) qui auront retenu et recelé la dite dixme, et de trois écus d'amende, etc., etc."

Bourjeon, Tome 1er p. 313, s. 19. "La dixme des grains se paie sur le terrain ou champ qui les a produits et non autrement; ainsi le domicile de celui qui cultive n'est point à considérer, nos usages rejettent toutes dixmes personnelles...." S. 21. "Pour éviter que ceux auxquels ce droit appartient, n'en soient frustrés, nul ne doit faire la récolte de son champ, que la récolte ne soit ouverte, et doit, avant d'enlever, avertir celui à qui la dixme appartient."

P. 314, s. 24. "Nul détenteur ne peut être poursuivi pour la dixme due par son prédécesseur."

P. 316. "Le propriétaire du fonds a le droit d'en changer la culture à son gré, ce droit étant une suite de sa propriété.... la dixme cesse d'être due par cette nouvelle culture."

Pothier, Ed. Bugnet, traité du louage No. 213. "Il y a beaucoup moins de difficulté à décider que la dixme doit être acquittée par le fermier et non par le propriétaire, car la dime n'est pas une charge du fonds... c'est le fermier qui perçoit les fruits qui doit la payer parce qu'elle n'est due que sur les fruits, et en vertu de l'usage dans lequel sont ceux qui perçoivent les fruits, de la payer."

Même auteur p. 81, traité de la vente. "Les charges.... dont le vendeur n'est pas tenu de garantir l'acheteur quoiqu'elles n'aient pas été déclarées par le contrat, sont 1^o. toutes celles qui sont de droit commun. De ce nombre est la dime. Ce n'est pas proprement une charge réelle, la dime étant une charge des fruits et

une dette de celui qui les recueille, plutôt qu'une charge de l'héritage qui produit les fruits : car le Curé ou autre décimateur n'a aucun droit dans les héritages sur lesquels il perçoit la dîme ; mais il est seulement fondé dans une louable coutume de percevoir la dîme des fruits qui se recueillent dans la paroisse."

Le règlement du 4 septembre 1867 confirmé par l'Edit de Mai 1879, fixe la quotité de la dîme au 26e minot, le grain devant être battu, vanné et porté au presbytère, et il impose le devoir de payer cette dîme, aux propriétaires et aux fermiers. "Ordonnons," dit ce règlement, "que les dixmes de quelque nature qu'elles puissent être, tant de ce qui naît en Canada du travail des hommes.... que de ce que la terre produit d'elle-même, se lèveront au profit des ecclésiastiques qui desserviront les cures, sur le pied de la 26e portion.... que les dites dixmes seront payées par les propriétaires des terres ou leurs fermiers, conformément à l'estimation, etc.... et que chaque habitant pour faciliter la perception de ce droit, de soy trop difficile à assembler, remettra en grains et non en gerbes, ce qu'il devra, au lieu de la demeure principale du curé ou prestre desservant la cure."

Nous voyons ensuite le règlement du conseil supérieur du 20 mars 1868 qui ordonne que le propriétaire et le fermier paieront la dîme à proportion de ce que chacun d'eux retirera, à moins de convention contraire entr'eux.

Mgr Desautels dans son ouvrage appelé *Manuel des Curés*, p. 87, après avoir cité le règlement du conseil supérieur, déclarant que le propriétaire et le fermier paieront la dîme à proportion de ce que chacun retirera, ajoute, "mais nous sommes d'opinion que le Curé peut exiger toute la dîme du propriétaire, si celui-ci ne lui a donné les renseignements qui constatent que la terre sur laquelle a été faite la récolte, est cultivée non par un simple employé à gages, mais par un véritable fermier. L'exemption en faveur du propriétaire ne se présume pas."

Mgr Desautels discute ensuite la question au point de vue du fait que le fermier et le propriétaire seraient Catholiques ou Protestants.

Je référerai aussi les parties aux notes des Juges dans la cause Thérberge et Vilbon, Vol. 3, Décisions des Tribunaux, p. 198 et suivantes, le sens général de ces notes exprimant que la dîme ne peut réellement être réclamée que de celui qui possède l'héritage et recueille les grains.

Code des Curés de feu M. le Juge Beaudry, p. 98. "La dîme est due au Curé de chaque paroisse légalement reconnue sur les grains recueillis dans l'étendue de cette paroisse, par tout propriétaire ou fermier, professant la religion catholique."

Et M. le Juge Beaudry ajoute : "Il n'est pas nécessaire que le propriétaire réside dans la paroisse. La dîme est due par la terre et se paie par celui qui retire les fruits."

P. 100. "La dîme étant une charge des fruits, il est évident que celui qui les recueille doit acquitter cette charge."

P. 101. "La part des récoltes formant la dîme doit être engrangée, battue et vannée et portée au presbytère par le contribuable à ses frais et dépens. C'est en conséquence de la réduction de la quotité de la dîme que le Législateur a imposé au débiteur l'obligation de la recueillir et la rendre en grains, nette et sans frais pour le curé."

Il me semble que toutes ces citations prouvent amplement que c'est celui qui possède et recueille qui doit payer la dîme. Il est bien obligé, en sus, de la battre et vanner et porter au presbytère, mais il faut d'abord qu'il la recueille, et si, après l'avoir recueillie, il ne la bat pas, ne la vane pas et ne la porte pas au presbytère, soit en laissant le grain dans sa grange, ou en le vendant ou donnant, la conséquence en est qu'il peut être poursuivi pour la valeur de cette dîme tout comme si l'ayant battue et vannée, il ne l'aurait pas portée au presbytère.

M. le Juge Beaudry, dans l'appendice 3e de son ouvrage, cite un jugement de la Cour d'Appel rendu en 1869, et où l'on trouve le considérant ci-après, qui établit contre qui doit s'exercer le droit à la dîme. Il s'agit d'une du Révérend Messire Dehaut contre Narcisse Pacaud, "Considérant," dit le jugement, "que l'intimé en Cour Inférieure (le Curé) a justifié tant en fait qu'en droit les allégations de sa demande, et notamment qu'en sa qualité de curé de la paroisse de St. Maurice, il avait droit à la dîme sur les fruits décimables recueillis dans la dite paroisse et sur les terres qu'y possède le défendeur, appelant."

De toutes les citations ci-dessus, il apparaît suffisamment que la Cour ne peut légalement sympathiser avec le jugement rendu par la Cour du Banc du Roi en 1808 in re *Robitaille v. Lamarre*, auquel jugement je faisais allusion plus haut.

Je crois que ce jugement est erroné en principe. Si les juges qui ont rendu ce jugement, eussent appliqué ce règlement de 1667 dont la teneur apparaît tout au long dans l'ouvrage de M. le Juge Beaudry, p. 93 et suivantes, il semble qu'ils n'auraient pas jugé la question qui leur était soumise de la manière dont ils l'ont fait.

D'abord ils n'auraient pas renvoyé la défense faite par le défendeur Lamarre, à l'effet qu'il ne devait pas de dime attendu qu'il avait trois ans à semer en terre neuve sans payer de dime, car ce règlement de 1667 ratifié par l'Edit de Mai 1679, pourvoyait justement à ce que celui qui aurait fait terre neuve jouirait pendant cinq ans de sa terre sans payer de dime. Et ensuite ils y auraient vu non-seulement que la quotité de la dime était réduite à la 26e portion et portable en grains au presbytère, mais de plus qu'elle devait être payée par les propriétaires ou fermiers qui avaient fait la récolte.

Les arrêts du Conseil Supérieur rendus sub-séquemment, et spécialement ceux de 1705, 1706 et 1707, n'ont apporté aucune modification à la partie du règlement de 1667, qui nous occupe dans la présente poursuite, mais n'ont fait que confirmer le droit du Curé à la 26e portion des grains récoltés, comme dime, le grain devant être engrangé, battu, vanné, et porté au presbytère.

M. le Juge Beaudry, parlant du droit qu'avaient les nouveaux colons qui faisaient de la terre neuve de jouir de cette terre pendant cinq ans, sans payer de dime, constate l'erreur commise dans le jugement ci-dessus, à cet égard.

Ce jugement ne peut donc faire autorité.

Il n'y a suivant moi aucun lien de droit entre le commerçant qui aurait acheté une partie de la récolte d'un cultivateur, même en grange, et le Curé, relativement au paiement de sa dime. Non-seulement le texte des auteurs réprouve la chose, mais les inconvénients et embarras qui en résulteraient sont trop nombreux pour croire que tel droit puisse exister.

Voici un commerçant qui a acheté une partie d'une récolte, en grange, du propriétaire qui était tenu de payer la dime. Ce grain a été depuis revendu dans le même état, et en est rendu dans ce même état à sa troisième ou quatrième mutation. Qui de ces trois acquéreurs devra payer la dime ? Ils sont tous devenus propriétaires les uns après les autres du même grain et dans la même condition. Pourquoi le der-

nier paierait-il la dime plutôt que le premier ou le second ? Il est vrai qu'il n'y en a qu'un qui aura battu et vanné, comme le dit le savant avocat du demandeur ; mais battre et vanner ne suffisent pas pour créer l'obligation et établir le lien ; il faut avoir perçu ou recueilli le grain ainsi battu et vanné.

Je suppose maintenant que ces ventes successives d'une telle récolte, en grange, se fassent dans un certain nombre de mains différentes par le propriétaire même qui l'a récoltée, par portions, et que plusieurs de ces acquéreurs achètent des quantités, qui ne leur permettent pas d'avoir un 26e minot, comment le Curé arrivera-t-il à ces divers acquéreurs ? Comptera-t-il d'abord la quantité de minots que se sera trouvé à avoir le premier acquéreur, et si cette quantité n'a donné, je suppose, que 20 minots de grain, exercera-t-il son droit d'action contre le second, qui n'en aura eu que 20 minots, lui aussi, parce que, dans ces derniers 20 minots, il se sera trouvé à avoir le premier 26e minot de la récolte ? Et faudra-t-il qu'il se mette ainsi à la recherche de chacun des autres 26e minots, entre les mains des acquéreurs qui auront suivi le premier ?

La chose serait impossible, et dans tous les cas impraticable.

Et d'ailleurs il n'y a rien dans nos lois, qui donne au Curé, pour sa dime, un droit de suite sur le grain de la récolte, quand il a été vendu.

Le Curé n'est pas propriétaire non plus d'aucune partie de cette récolte, dans le sens strict et légal du mot, de manière à l'autoriser à exercer l'action en revendication entre les mains de l'acheteur.

Il a l'action personnelle purement et simplement ; et si le propriétaire a vendu cette récolte, sans faire réserve de la dime, il en est resté débiteur vis-à-vis du Curé, et il la doit lui-même, tout comme s'il eût non-seulement récolté, mais aussi battu et vanné.

Dans le cas actuel, en surplus, le défendeur n'est pas un des paroissiens du demandeur, et n'apparaît pas par la preuve avoir aucune propriété dans la paroisse.

Action déboutée.

J. P. Carreau pour demandeur.

A. N. Charland pour défendeur.

The Legal News.

VOL. VI.

JUNE 2, 1883.

No. 22.

STAMPS ON PROMISSORY NOTES.

Our notes of cases this week contain a decision by Mr. Justice Chagnon in *Filion v. Roy*, in which the learned judge differs from the view taken by Mr. Justice Taschereau in *Dickson v. Normandeau* (ante, p. 136). In the latter case it was ruled that the holder of an unstamped promissory note may still make it valid by double stamping where he would have had the right to do so if the Repealing Act had not been passed. The point is evidently not free from difficulty, and the question will probably be discussed before the Court of Appeal. We observe, however, that a case has been brought before the Queen's Bench Division at Toronto, *Coughlin v. Clark*, in which the same point is raised. It is an appeal from the judgment of Wilson, C. J., who tried the case without a jury at Brampton at the last assizes, and gave judgment for the plaintiff for \$630 upon a promissory note. The appeal is taken on the ground that the note was not stamped at its maturity before the repeal of the Stamp Act, and that double stamping after the repeal does not cure the defect. The defendant also sets up the Statute of Frauds as against the plaintiff's right to recover upon the consideration. Judgment has been reserved, but it appears that the opinion of Chief Justice Wilson agrees with that of Mr. Justice Taschereau.

JUDICIAL SALARIES.

The question of re-adjusting the salaries of the Judges of the Superior Courts came before the House of Commons on the 19th May, and the fact seems to have been admitted by the Government that the salaries of those who reside in the large cities are inadequate. Mr. McCarthy pointed out that the Judges in Canada receive less than the Judges of any other colony under the British flag with one or two insignificant exceptions. In Jamaica, for instance, the Chief Justice receives £2,500 sterling, or about \$12,500, while the puisné judges are paid £1,500 sterling each. In the Cape of Good Hope the salary is £2,000 sterling, and in New South

Wales, a colony with a population of 749,000, it is £2,600. The Premier showed a disposition to accede to the wishes of the House, the principal objection being that the smaller provinces would expect a proportionate increase. This will hardly seem a satisfactory reason, to those who are admittedly underpaid, why their claims should be deferred. We append, from the *Commons Debates*, a portion of the observations of the Premier:—

"Sir John A. Macdonald.—I have listened with great interest to the remarks of my brethren of the Bar and members of this House as to the deficiency of the amount of salaries paid to the Judges. Those remarks would have had greater relevancy if there was a proposition before the House to raise the salaries of the Judges, because as such increases come from the public Treasury they require justification as to the reasonableness of the amounts proposed. This, however, is not the object of these resolutions. However, as the matter has been mooted, I will say that a strong feeling exists in the Province of Ontario that the Judges of the Superior Courts are insufficiently paid, and that in the future the present salaries will not command the best talent for the Bench. Hitherto, I believe, they have been sufficient, and I think the present state of the Bench, the standing of the gentlemen composing the Bench, shows that the salaries were, at all events sufficient to induce them at the time to accept office. There is a feeling among the Bench and Bar in Ontario that the incomes of leading counsel have so much increased in consequence of the increased wealth of the country, that the salaries at present paid to the Judges are insufficient to induce leading counsel to retire to the quiet and dignity of the Bench. I believe, also, the same feeling prevailed in the city of Montreal, among the professional and commercial classes there, that the Judges are not sufficiently remunerated to secure the best talent for the Bench. I do not hear the same complaint from other parts of the Dominion, except to-day, when it was mentioned by hon. members from the Province of Prince Edward Island. The difficulty the Government have in dealing with this question is, that the moment they deal with the salaries of the Judges in any one Province, there arises a corresponding demand, although the same necessity may not exist, from all the other Provinces. This is

the difficulty which the Government felt, and this together with other circumstances of a temporary nature, with which I need not trouble the Committee, prevented the Government coming down with any measure during the present Session. They must carefully consider not only the position of the Bench in Ontario and the district of Montreal, but the position of the Bench in all the Provinces, and reasonable requirements, and this forces the Government, whenever it deals with this question, to consider the whole question as affecting the Bench of the various Provinces. With reference to the Province of Ontario, a similar demand is made for the increase of the salaries of the County Judges, who are very numerous. That also will be taken into consideration. In answer to the suggestions of my hon. friend from North Simcoe (Mr. McCarthy) I will say that the Government intend to address themselves during Recess with the view of studying the pressure and the reasons of the pressure that exists in the Province of Ontario and Montreal, and is brought to bear on the Government in this relation, and will come down with some general scheme at the next Session."

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, April 30, 1883.

Before TORRANCE, DOHERTY, RAINVILLE, JJ.

LIZOTTE vs qual. v. DESCHENEAU.

Action en déclaration de paternité—Proof of paternity.

An action en déclaration de paternité may be maintained, where it is proved that the defendant had connection with the mother at the time, though it also appear that others were guilty with him.

TORRANCE, J. This is an action en déclaration de paternité. The plaintiff is representing his minor daughter, a girl of 15 or 16, who gave birth to an illegitimate son on the 17th January, 1882. An enormous mass of evidence has been taken, some 900 pages, which the Court was obliged carefully to examine. The defendant, Henri Descheneau, was charged with being the father of the child. The Court at Sorel held that though there were certain circumstances against the defendant, yet the material fact, namely, the paternity, had not been proved. The evidence is entirely circumstantial against

the defendant. Mme. Descoteau, *née* Delphinée Bibeau, lived close to the minor, Arpine Lizotte, and deposed that defendant came to the house in April, 1881, and asked if Bernier, the master, was in. She told him that Bernier and his wife were away, but that Arpine was in. He said he had tried the door and found it barred. She said, nevertheless, Arpine was there. He then got in. On another occasion he came during mass. All were out but Arpine. Seeing them together, Mme. Descoteau thought they had "*des discours amoureux*." Another witness Mme. Lauzière, testified to the defendant going to the house where Arpine was, in the absence of her guardian and everybody else. Joseph Lauzière, the servant of Bernier, says he found Arpine and the defendant in the doorway of Arpine's room. They had an air of confusion—"*l'air tout bouleversé*." They shut the door and drew the curtain. The defendant, joking about her, said: "*Qu'il allait la mettre couver*." It is true that this witness bears an unenviable reputation, but his evidence is not without corroboration. Israel Lauzière says that Henri Descoteau went to see Arpine *en cachette* of her guardians—namely, Bernier and his wife. Then we have the declaration of Arpine when in the pains of labor and apprehensive that she might die. She said that Henri was the father, meaning the defendant. The story told by Mr. Blondin, the County Registrar, has some weight in it. When the birth took place they wished for evidence of the paternity. The Descheneau family were interrogated, and half a dozen persons were named who could give information. Blondin saw these different persons, and concluded that the defendant was the father. The father of defendant offered \$50 to stop the suit, and his lawyer, or the lawyer of the defendant, offered \$100 in settlement. Blondin further said that the child was *un témoignage terrible vivant contre le défendeur*.

It was said that the girl was *légère*. But this question was not the important one. She may have been intimate with others. The important question here was this: Was the defendant guilty, &c.? If he were guilty and others were guilty with him it did not exonerate him. All were jointly and severally liable. Anselme Descheneau, the brother of Henri, swears that he had connection with the girl again and again. Another brother, a lad of seventeen,

swore that he took indecent liberties with Arpine again and again, and that she repeatedly did the same thing with him. All this reveals a deplorable state of morals in these families, but the defendant should not escape, and the Court are strongly of opinion that his condemnation will tend to the doing of justice.

Judgment reversed, and the defendant condemned to pay \$100 damages, and \$4 per month alimentary allowance, until the child attains the age of 14.

J. B. Brousseau, for plaintiff.

A. Germain, for defendant.

COURT OF REVIEW.

MONTREAL, April 30, 1883.

Before TORRANCE, DOHERTY, RAINVILLE, JJ.

BRICE v. THE MORTON DAIRY FARMING AND COLONIZATION CO.

Promissory Note of Corporation — Evidence — Authority of President to sign.

This was a judgment against the company for \$8,175.71. The defendant pleaded that Thomas H. Hodgson, who signed, as President, the note upon which the defendant was condemned, was not authorized. The defendant was condemned to pay.

Before the Court of Review two objections were made by the defendant. 1st, that the notice of trial was not regular. 2nd, that the authority of the President to sign the note for the defendant was not proved.

TORRANCE, J. We find that the plaintiff inscribed for trial, and filed his inscription on the 3rd March for trial on the 20th March. He subsequently, on the 9th March, gave notice to the defendant's attorneys for the 20th March. All this was perfectly regular, and the Court so held on a motion made by the defendant to strike the inscription.

Next, as to the authority of the president to sign the note. The counsel for defendant, Mr. Geoffron, referred us to the Canada Joint Stock Companies Act, 1877, section 66. This section, after saying that any note made by an officer of a company in general accordance with his powers as such under the by-laws of the company, shall be binding on the company, enacts further, "in no case shall it be necessary to prove that the same was made in pursuance of

any by-law," &c. The burden of proof is on the defendant to disprove the authority of the president, which he has failed to do.

Judgment confirmed.

Ritchie, for plaintiff.

Geoffron & Co., for defendant.

SUPERIOR COURT.

MONTREAL, May 1, 1883.

Before LORANGER, J.

In the matter of MULHOLLAND & BAKER, Insolvents, and JOHN FAIR, Assignee, and THE MERCHANTS BANK OF CANADA, Claimants, and THE CONSOLIDATED BANK OF CANADA, contestants.

Insolvent Estate—Interest on Claims.

Held, where there is a surplus in the private estate of one member of an insolvent firm after paying his creditors the amount of their claims as filed, but a deficiency in the firm estate to pay firm creditors, the latter have no claim upon such surplus until the private creditors, who have interest-bearing claims, have been paid interest upon the amount of their claims, from the date of filing the same till payment.

In a dividend sheet prepared and published in this matter, the Merchants Bank, claimants upon the estate of Henry Mulholland, one of the members of the firm of Mulholland & Baker, having an interest-bearing claim, were collocated for the sum of \$409.91, for interest upon the full amount of their claim as filed, from the date of filing the same up to the date fixed for payment thereof.

This collocation was contested by the Consolidated Bank, claimants upon the estate of the firm, upon the grounds that on their claim of \$250,000, they had only been collocated for \$17,839.14; that the Merchants Bank as creditors upon the individual estate of Henry Mulholland, had been paid in full, the amount of their claim as filed; that the \$400.91 was solely for interest, and the collocation thereof was illegal and operated an injustice to the firm creditors, who were entitled to have such sum, and all sums purporting to be a surplus of the proceeds of such individual estate, brought into the firm estate for the benefit of firm creditors.

The Merchants Bank answered the contestation by alleging: (1) That the Consolidated Bank had no *locus standi*, having no longer a cor-

porate existence; and (2) That the Merchants Bank as creditors upon the individual estate of Henry Mulholland, were entitled to be paid their debt in full, which included interest as collocated, before any portion of the proceeds of that estate could go to the benefit of firm creditors.

The proof established that the firm creditors had only received a dividend of so much on the dollar; that the claim of the Merchants Bank was an interest-bearing one; that the Bank had received twenty shillings in the pound upon the amount of the claim as filed, and that the collocation of \$409.91 was solely for interest upon the amount of the claim from date of filing thereof till the date of payment.

At the argument, *Robertson*, for the Consolidated Bank, contended:

By the Act authorizing the winding up of the Consolidated Bank of Canada, (43 Vic. Chap. 46), it was enacted that liquidators should be appointed who should have all the administrative powers of Directors, and they were empowered, in the event of an offer being made for the purchase of the remaining assets of the Bank *en bloc*, to submit the same to the shareholders, and, if approved, to execute a conveyance thereof to the purchaser. Such sale had been duly effected to the Canadian Securities Company; and by the deed of conveyance, it was expressly stipulated that the Company should have the right to use the name of the Bank in legal proceedings.

By a subsequent Act of the Dominion Parliament (45 Vic. chap. 85) this deed had been in effect confirmed; and it was enacted that the Company should fulfil all the duties and have all the powers and responsibilities of the liquidators.

The action was therefore well brought in the name of the Consolidated Bank of Canada.

As to the right of the firm creditors to the surplus in the individual estate of Henry Mulholland, section 80 of the Insolvent Act provided that all debts due and payable by the insolvent at the time of the execution of a deed of assignment, or at the time of the issue of the writ of attachment under the Act, and all debts due, but not then actually payable, subject to rebate of interest, should have the right to rank upon the estate of the insolvent.

Section 88 provides: "If the insolvent owes

"debts, both individually and as a member of a co-partnership or as a member of two different co-partnerships, the claims against him shall rank first upon the estate, by which the debts they represent were contracted, and shall only rank upon the other after all the creditors of that other have been paid in full."

The words "paid in full" in section 88 refer to the amount of the claims filed, as provided in sec. 80. The claims upon Henry Mulholland's estate had been paid in full, within the meaning of sec. 88, as the creditors had received 20 shillings in the pound on their claims as filed,—and hence any surplus should go to firm creditors.

Tait, Q.C., for Merchants Bank:—

The Consolidated Bank of Canada has no longer any corporate existence, and no suit or proceeding can be taken in its corporate name. All its assets are vested in the Canadian Securities Company, cap. 65. The present proceeding therefore cannot be maintained.

The interest of the claimants to raise this question, consists in this, amongst other things, that a judgment in their favor against a non-existent and altogether fictitious contestant, would be no bar to a similar proceeding by the Canadian Securities Company. And also in this, that the claimant has no remedy for the costs incurred in these proceedings, if judgment should be rendered in his favor. The claimant in this case, if successful, would not obtain his costs under any execution or other writ, but would be obliged to institute a new suit against the Canadian Securities Company to recover those costs. And it is impossible to say how far the claimant could establish any liability against the Canadian Securities Company.

If this proceeding is for the benefit of the Canadian Securities Company, it should have been instituted in their own name, as being vested with the rights of the Bank; or as its liquidators.

Section 80 of the Insolvent Act contemplates a deficiency in the assets of the insolvent to meet his liabilities, and therefore provides a common basis upon which all creditors shall rank upon the estate, so that one shall not have an undue preference over the other. But this section does not contemplate that the creditors shall be restricted to receiving from the estate the precise amount of their claims as limited by

the said section, should there be a surplus of assets over liabilities. Section 99 of said Act provides, that if any balance remains of the estate of the insolvent, or of the proceeds thereof after "payment in full" of all debts due by the insolvent, such balance is to be paid over to insolvent.

If interest was not included in the words "payment in full of all debts due by the insolvent," found in this section, fraud could be perpetrated by a person upon his creditors. By assigning he could escape the payment of interest beyond the date of the insolvency, and after payment of the amount of claims as filed, receive back the surplus of his estate, thus saving interest from the date of insolvency till payment of claim.

In this matter the estate of Henry Mulholland, individually, is more than sufficient to pay his individual creditors their debts in full; and under these circumstances the claimant as a creditor upon the estate of Henry Mulholland individually is, under section 88 of the Insolvent Act, entitled to be paid his debt in full, before any portion of said individual estate can go into the firm estate for the benefit of the firm creditors.

The firm creditors do not stand in any better position with regard to the surplus in the estate after paying the debts in full of the creditors of Henry Mulholland individually than Henry Mulholland himself would stand with regard to such surplus, supposing there were no firm creditors. The language is the same in section 88 as in section 99. In the last named section, the insolvent gets any balance remaining after "payment in full" of all debts due by him. In section 88 the firm creditors would get the balance remaining after the creditors of the individual estate have been "paid in full." The principle laid down in the Insolvent Act is the same as that to be found in article 1889, C. C. and the Consolidated Statutes of Lower Canada, cap. 65, sec. 6.

After a recital of the pleadings the judgment proceeded as follows:—

"La Cour, adjugeant sur le premier point:—

"Attendu que par l'Acte de Cession ci-dessus cité du 19 Aout, 1881, par la Banque Consolidée à la Compagnie de Suretés Canadienne il est stipulé que cette dite Compagnie aura le droit de se servir pour les fins de la perception ou la

protection des créances qui lui sont cédées dans toutes les poursuites au nom de la dite Banque Consolidée;

"Attendu que par le chap. 65 de la 45 Vict. la dite Compagnie de Suretés Canadienne est autorisée comme les liquidateurs de la dite Banque l'étaient eux-mêmes sous l'autorité de l'acte 43 Vict. chap. 46, à se servir du nom de la dite Banque pour les fins de la liquidation de ses affaires;

"Renvoie cette partie de la contestation de la Merchants Bank of Canada, et déclare que la contestation produite au nom de la dite Banque Consolidée est valablement produite;

"Sur la seconde question soulevée par la dite contestation:

"Attendu que les créanciers de Henry Mulholland ont sur ses biens personnels une préférence sur les créanciers de la Société Mulholland & Baker dont ils faisaient partie, que ceux-ci ne peuvent réclamer que le surplus restant de ses biens après le paiement de ses dettes, aux termes des sections 88, 89 de l'acte de faillite de 1875 et ses amendements et de l'article 1899 du Code Civil; que les biens personnels du dit Henry Mulholland ayant été suffisants pour payer ses dettes en entier, capital et intérêt, la créancière The Merchants Bank of Canada, dont la créance porte intérêt suivant la loi, a le droit d'en recevoir le montant calculé jusqu'au jour du payment, savoir: le 23 Janvier dernier, jour où la feuille de dividende était faite payable; que la faillite de son débiteur personnel n'a pas eu l'effet d'empêcher les intérêts de courir en sa faveur et que la Banque Consolidée est sans droit à lui contester ces intérêts;

"La Cour renvoie la contestation de la dite Banque Consolidée contestante et maintient la dite réclamation de la dite The Merchants Bank of Canada, en son entier, avec dépens distracts à Messieurs Abbott, Tait & Abbots, Avocats des Réclamants."

Abbott, Tait & Abbots for claimants.

Robertson, Ritchie & Fleet for contestants.

SUPERIOR COURT.

MONTREAL, May 1, 1883.

Before LORANGER, J.

Ross et al. v. O'LEARY, and Ross et al., Petrs.

Execution—Contempt of Court.

Held, that a defendant who induces a bailiff, charged with a writ of execution against him, not to

seize his goods and effects, but to accompany him to the plaintiff's for the purpose of effecting a settlement, and in the interval between the bailiff's leaving his place and returning again to make seizure, removes part of his goods, will be declared to be in contempt of Court, under articles 782 C. C. P. and 2273 C. C., and will be imprisoned in the common gaol until he satisfies the amount of the debt, interest and costs.

The judgment of the Court is as follows :—

“ La Cour après avoir entendu les parties sur la motion du 13 septembre 1883, pour contrainte par corps contre le défendeur, examiné la preuve et les pièces produites au dossier, et avoir sur le tout délibéré ;

“ Considérant qu'il appert par le retour de l'huissier chargé du bref d'exécution en cette cause que le dix-huitième jour du mois d'août dernier il se serait présenté au domicile du défendeur pour exécuter le dit bref, que sur demande de ce dernier il aurait sursis à l'exécution du dit bref pour se rendre chez le demandeur sur le but d'effectuer un règlement, et que vu l'absence du demandeur de son domicile il avait sur la promesse du défendeur de ne rien enlever des lieux occupées par lui, il aurait remis au lendemain, le 19 août, l'exécution du dit bref ; que le lendemain s'étant présenté au domicile du dit défendeur pour exécuter le dit bref, il aurait constaté qu'il en avait enlevé plusieurs meubles, entre autres un piano qui s'y trouvait, le dit jour dix-huit août lors de la première visite du dit huissier ;

“ Considérant qu'à raison des faits ci-dessus le demandeur a demandé par sa motion du 13 septembre, la contrainte par corps aux termes des articles 2273 et 783 du Code Civil et de Procédure Civile ;

“ Considérant que le défendeur a plaidé à cette motion ; 1o. Que le demandeur ayant fait arrêter le défendeur sur *Capias* pour les causes mentionnées dans la dite motion, il ne pouvait lui, défendeur, être contraint par corps deux fois pour la même cause et que la motion pour contrainte était contraire à la loi ; 2o. Que le piano et les meubles qui avaient été enlevés des lieux occupés par le défendeur étaient la propriété de sa fille Kate O'Leary, qui les avait enlevées elle-même et sans sa participation ;

“ Considérant qu'il n'existe en la présente cause aucune preuve de prétendre *capias* émané

contre le défendeur, ce dernier n'ayant fait aucune preuve sur ce fait ;

“ Considérant qu'il a été prouvé que le dit défendeur a enlevé des lieux occupés par lui après la première visite de l'huissier, le dix-huit août dernier, un piano et un sofa, et que ces meubles n'ont pu en conséquence être saisis par le dit huissier ;

“ Considérant que le défendeur n'a pas prouvé que le dit piano ni le dit sofa fussent la propriété de sa fille Kate O'Leary, mais qu'au contraire il a été prouvé que ces meubles ont été achetés et payés par lui ;

“ Considérant que le rapport de l'huissier saisissant sur le dit bref d'exécution n'a pas été contesté et fait preuve contre le défendeur ;

“ Considérant qu'à raison des faits ci-dessus le défendeur est aux termes de l'article 782 du Code de Procédure Civile contraignable par corps, et que la motion du défendeur est bien fondée ;

“ Maintient la dite motion, déclare absolue la règle pour contrainte par corps obtenue contre le défendeur, et ordonne que le dit défendeur soit contraint par corps et emprisonné dans la prison commune du district de Montréal jusqu'à ce qu'il ait satisfait à la balance due sur le bref d'exécution en cette cause en capital, intérêt et frais du dit bref, savoir la somme de \$230.61 cours actuel, dont \$126.76, montant, du jugement rendu en cette cause contre le défendeur en faveur des demandeurs le premier jour de février, 1868, et \$103.85 pour balance d'intérêt accru sur ce montant, avec intérêt sur la dite somme de \$230.61 à compter du onse septembre, 1882, date de la signification de la dite motion pour règle, et, en outre, jusqu'à ce qu'il ait satisfait et payé les frais sur la dite motion pour règle, lesquels s'élèvent à la somme de \$24.55, formant avec la somme ci-dessus un total de \$255.16 courant ; le tout avec dépens distraits à Maître Cooke, avocat des demandeurs.”

J. P. Cooke for petitioner.

D. Barry for defendant.

CIRCUIT COURT.

DISTRICT OF INDIANAPOLIS, April 30, 1883.

Before CHAGNON, J.

FILION V. ROY.

Promissory Note—Stamp duty—Effect of the Repealing Act as to right to affix double stamps.

PER CURIAM. Les demandeurs réclament du défendeur le montant d'un billet dont ce dernier est le faiseur. Ce billet est daté d'août 1876, et n'a été timbré par les demandeurs qu'en février 1883, c'est-à-dire depuis l'abolition de la loi relative aux timbres. Les demandeurs y ont apposé doubles timbres et même au-delà, ont annulé les timbres de la manière dont l'exigeait le statut avant son abrogation et ont ensuite pris leur action.

Le défendeur qui est comme je le disais tout à l'heure, le faiseur du billet, plaide que le billet est nul parce qu'il n'a pas été dûment estampillé, et parce que les timbres qui y ont été apposés l'ont été sans droit.

Le statut relatif aux timbres, avant son abrogation, permettait au porteur de l'instrument non timbré dans le temps où il aurait dû l'être, d'y apposer doubles timbres, et par là de le valider, pourvu que si la validité de ce billet était ensuite questionnée dans la poursuite faite pour son recouvrement, le porteur pût démontrer que c'était par suite d'une simple erreur ou inadvertance et non dans le but de violer la loi qu'il ne l'avait pas tout d'abord timbré.

Ce droit du porteur de valider l'effet en y apposant doubles timbres lui était consacré par la s. 2 du chap. 47, 37 Vict. 1874, amendant les actes primitifs, et encore par la refonte des statuts relatifs aux timbres, 42 Vict. ch. 17, s. 13.

L'acte d'abrogation de la loi des timbres a-t-il eu l'effet de faire perdre ce droit au porteur ?

Cet acte d'abrogation 45 Vict., ch. 1, déclare qu'aucun droit ne sera payable sur aucun billet ou lettre de change fait ou tiré après le 4 mars 1882, et qu'à compter de cette dernière date, l'acte 42 Vict. contenant la refonte de la loi des timbres, lequel acte avait déjà rappelé la loi antérieure à ce sujet, serait abrogé. Jusque là, il y aurait certainement peu d'espoir pour le porteur en défaut.

Mais il y a des réserves, et ce sont ces réserves qu'il importe d'examiner dans l'espèce.

L'acte d'abrogation ajoute à son décret d'abolition :

" Pourvu toujours que toutes choses légalement faites et tous droits acquis en vertu du dit acte, ou de tout acte qu'il abroge restent valides....."

Or, si le porteur a, nonobstant l'abolition, conservé sa faculté d'apposer doubles timbres, ce ne peut être qu'en vertu de la réserve dont je viens de faire mention.

Le statut dit : " Toutes choses légalement faites lors de l'abolition resteront valides." Sûrement le porteur actuel, le demandeur, ne peut trouver la consécration de son droit dans cette réserve ; car lors de l'abolition, il n'avait encore rien fait. Je comprends que si lors de l'abolition, il avait déjà apposé doubles timbres, et que la question de bonne ou mauvaise foi seulement se fût présentée devant le tribunal depuis l'abolition, cette question de bonne ou mauvaise foi aurait pu être traitée depuis l'abolition sans nuire à sa position ; mais dans la cause actuelle, il n'avait encore rien fait légalement, relativement à son billet avant l'acte d'abrogation.

Ce dernier acte dit encore : " Tous droits acquis en vertu de l'acte abrogé resteront valides." Le demandeur avait-il eu droit acquis dans son billet et dans la somme qui en faisait l'objet lors de l'acte d'abrogation ? Le billet n'était pas timbré et il était nul, absolument *void*. Si un droit était alors acquis au profit de l'une ou de l'autre des deux parties, il me semble que c'était plutôt le défendeur qui avait ce droit acquis. Car lors de l'acte d'abolition, le billet était nul, et conséquemment le défendeur n'était plus dès lors obligé de le payer.

Le droit que l'acte des timbres permettait au porteur d'exercer en apposant doubles timbres, sauf la question de bonne ou mauvaise foi, ne peut être ce que l'acte d'abrogation appelle les droits acquis. Cette faculté réservée au porteur de corriger l'erreur commise et de soumettre à la Cour sa bonne ou mauvaise foi, était une de ces facultés que toutes les lois donnent plus ou moins aux parties que la loi entend régler.

Mais ces prétendus droits disparaissent avec l'abolition de la loi. Les parties restent alors avec leurs droits acquis, c'est-à-dire avec leurs droits tels qu'ils les avaient alors exercés. L'exercice ou non exercice de tels droits a fait acquiescer une position légale à l'une et à l'autre des parties. Et c'est cette position légale et

nulle autre que l'acte d'abrogation entend réserver, lorsqu'il dit que les droits acquis seront valides. Les expressions du législateur ont leur signification bien claire, et cette signification ne peut être autre que celle que je leur donne. S'il s'était agi de conserver au porteur la faculté d'apposer doubles timbres, l'acte d'abrogation lui aurait réservé nommément cette faculté, et aurait dit que la faculté du porteur d'apposer doubles timbres resterait valide. Cette expression "droits acquis devront rester valides" ne peut se rapporter qu'à des droits acquis dans l'effet (billet ou lettre de change) assujetti au droit de timbres.

Mais on dira :—Comment le faiseur lui-même pourra-t-il plaider cela ? L'invalidité du billet est la conséquence de sa propre faute et de sa propre négligence ; comment peut-il se libérer en se servant comme moyen de libération, de sa propre faute ou négligence ?

Il faut répondre que la négligence a été jusqu'à un certain point une négligence commune, et que d'ailleurs la loi l'a ainsi voulu. L'acte des timbres a voulu que la cour elle-même prit connaissance du défaut ; la loi déclare le billet non timbré nul et non avenue par soi.

Le législateur savait en édictant cette loi qu'il libérait le faiseur pour un motif dont le faiseur devait se reconnaître coupable, mais dans le but de protéger le fiac, il a cru qu'il fallait appliquer cette peine quelque sévère qu'elle fût. Il a alors remplacé la responsabilité qu'avait encourue le faiseur ou le tireur en signant le billet ou la lettre de change sans y apposer des timbres, par une autre responsabilité, consistant dans le paiement d'une amende. La loi reconnaît de plus, spécialement, le droit au faiseur d'invoquer cette cause de nullité, puis qu'elle lui permet de discuter la bonne ou mauvaise foi du porteur devant le tribunal devant lequel l'action est portée.

Cet acte d'abrogation, suivant moi, est tellement positif quant à l'enlèvement de la faculté dont il est question, qu'il pourvoit à ce que, de la date de l'acte d'abolition du 30 juin 1882, tous les timbres restant entre les mains et n'ayant pas encore servi, pourront être remis au gouvernement, ce dernier devant les accepter en paiement de toute somme payable à Sa Majesté pour les besoins publics du Canada, ou les recevoir en échange de timbres-poste de même valeur nominale.

Si le législateur avait voulu permettre de timbrer les billets déjà émis avant l'abrogation et qui n'avaient jamais été timbrés ou ne l'avaient pas été suffisamment, comme la faculté en était réservée aux porteurs par les actes abrogés, il aurait pourvu aux moyens de se procurer ces timbres dans l'avenir pour les besoins sus-indiqués.

Et ce qui prouve encore que le législateur n'a pas voulu permettre de se servir légalement de timbres après l'acte d'abolition, c'est que, par l'acte d'abrogation, il a enlevé toute sanction pour le mauvais usage de ces timbres, tel que cette sanction pouvait exister dans et par les actes abrogés ; car l'acte d'abrogation détruit la possibilité de recourir à aucune pénalité pour les cas d'infractions y mentionnés. Seules les pénalités encourues lors de l'acte d'abolition sont réservées.

Deux jugements ont été rendus depuis cette loi d'abolition des timbres, sur et à propos de la question soulevée, l'un par M. le juge Taschereau, à Montréal, dans le mois courant, et l'autre par une des cours d'Ontario. Ce dernier jugement est rapporté dans le 5e vol. du L. N. p. 425. M. le juge Taschereau a maintenu le droit du porteur d'apposer doubles timbres, nonobstant l'abrogation de l'acte, et la cour d'Ontario a jugé la question dans un sens opposé.

Je suis d'avis que cette dernière décision doit être supportée. Et en conséquence, je déboute l'action, mais sans frais, attendu que le défaut provient pour le moins autant du faiseur que du porteur, et j'ajouterai même principalement du faiseur ; car c'était lui qui était chargé plus spécialement par la loi des timbres, de les y apposer.

Léon Lorrain for the plaintiffs.

J. P. Carreau for the defendant.

GENERAL NOTES.

We were unable, before going to press, to obtain the correct title of the case called *Doe v. Roe*, in our last issue (p. 165). The proper title is *Reverend Messire Gaudin v. Joseph Ethier*. Judgment was rendered by Mr. Justice Chagnon, on the 30th April last.

The following statement is circulated by the daily journals:—A summary of Mr. Judah P. Benjamin's fee-book, made up year by year since 1867, shows that he has in sixteen years received fees amounting to \$696,044.78. In 1867 they amounted to a trifle more than \$2,025 ; in 1882, to more than \$63,900 ; and in 1890 his most profitable year, to \$79,856.20. One of his most important cases was the Irish Fisheries suit, which paid him about \$50,000. As to personal enjoyment, he says he experienced little of it in his profession. His sole object was to make money ; and to that end almost every other personal consideration was sacrificed. He is now afflicted with an incurable heart disease, and realises that it may prove suddenly fatal at any moment.

The Legal News.

VOL. VI. JUNE 9, 1883. No. 23.

IMPLIED CONTRACT TO PAY AGENT AUTHORIZED TO BET NOT WAGERING.

ENGLISH HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION,
NOVEMBER 15, 1882.

REED v. ANDERSON, 48 L. T. Rep. N. S. 474.

Where a person authorizes another to bet for him in the agent's own name, an implied request to pay if the bet be lost is involved in that authority; and the moment the bet is made and the obligation to pay it if lost incurred, the authority to pay (if coupled with an interest based on good consideration) becomes irrevocable in law; and it is immaterial that such obligation is not enforceable by process of law, if the non-fulfilment of it would entail serious inconvenience or loss upon the agent.

Action to recover moneys paid to winners on bets made by plaintiff for defendant. The opinion states the facts.

HAWKINS, J. This action was brought to recover £175, the amount of three bets made by the plaintiff in his own name at the request of and for the defendant, and paid by the plaintiff to the winners thereof. The plaintiff is a turf commission agent, and a member of Tattersall's subscription room. The defendant is a licensed victualler at South Shields. According to well-established usage, known to the defendant, a turf commission agent, instructed by an employer to back a horse, backs it in his own name, and becomes himself alone responsible to the layer of the odds, or the person with whom the bet is made; and on the settling day after the event, he receives or pays, as the case may be, rendering his own account to his employer, paying to or receiving from him the balance of moneys won or lost. For some time before the Ascot meeting, 1881, the plaintiff had according to such usage, been in the habit of backing horses for the defendant, of receiving bets won, paying bets lost, sending accounts to the defendant, and paying to or receiving from him the balances thereof. On the Friday of the Ascot meeting (17th June, 1881), the plaintiff being at Ascot received from the defendant a tele-

gram to this effect. "Put me fifty on Limestone, first race; pony all Archer's mounts; fifty Sword Dance, hundred Elf King, Wokingham; hundred Red Rag filly, Castle Stakes. Reply." This telegram, though handed in at South Shields at 12.8 p. m., and received at Ascot at 1.29 p. m., did not reach the plaintiff until 1.40 p. m., at which time the first race for the day, in which Limestone ran, was over, that race having been run at half-past one; for that race, therefore, Limestone could not be backed. The second race of the day was the Wokingham Stakes, which was set down for two o'clock. For that race Sword Dance and Elf King, mentioned in the telegram, and Valentino, ridden by F. Archer, were entered; the plaintiff accordingly, acting on the telegram, backed in his own name Elf King for 100l.; Sword Dance for 50l., and Valentino (as one of Archer's mounts) for 25l. Neither of these horses won; the consequence was that these bets, to the amount of 175l., the subject of the present action, were lost. At 2.15 p. m., the plaintiff handed in at the telegraph office at Ascot the following message to the defendant: "Nothing done Limestone or Archer's mounts the first race—your message came ten minutes after the race." In this message, which was not delivered to defendant until 3.14 p. m., it will be observed nothing is said about the second race; but at 3.5 p. m., the plaintiff telegraphed the result of that race to defendant in these terms: "Your message received; Viridis won." This was evidently a mistake, for no such animal as Viridis ran in the race. The Wokingham was won by a colt by St. Albans out of Viridis. The mistake however is immaterial. This message was not received at South Shields until 3.35 p. m., and then defendant had received information by telegram, from another person of the result of the first two races. On the evening of the same day the defendant repudiated these bets and all liability in respect of them by the following letter to the plaintiff:—"Exchange Vaults, South Shields, 17th June, 1881.—Mr. Read,—I find your message was not handed in before the race for the Wokingham Stakes; I had the result of the race ten minutes before I received your reply. I enclose you the message, which please return to me; they were both handed in at 2.15, that being fifteen minutes after the order of running; so I shall consider I am not on anything for two first races to

day, as I cannot stand the messages being sent away after the race is over to say I am on. In haste, I remain, yours respectfully, J. Anderson." In reply to this letter the plaintiff wrote to defendant as follows:—"Dear Sir,—The reason you did not get your message about Elf King, S. Dance, and F. Archer mounts sooner was on account of so many messages being sent about the results of the Wokingham Handicap. The following bets I took for you. I inclose you the names: 100—800 Elf King; Jacob, A. 50—225 S. Dance; Robinson, J. 25—150 Valentino; Masterman." With this letter the plaintiff sent a detailed account of the various bets he had made for the defendant during the Ascot meeting, and of the amounts which he would have to receive from and pay to the defendant. In number there were between fifty and sixty, and the account showed that upon these the defendant's losses, including the bets in question, amounted to 1,420*l.* 0*s.* 5. whilst his winnings were 705*l.* 17*s.* 4*d.* leaving a balance of 714*l.* 3*s.* 1*d.* to be paid by the defendant. The defendant in reply, on the 19th June inclosed a cheque for £539 3*s.* 1*d.*, as being the real balance due, and with regard to the difference, 175*l.*, wrote thus: "I cannot think about paying the other, as I have other people to please as well as myself, and paid for reply, and you say you received message ten minutes too late for first race, but you cannot give any excuse for not answering it until the next race was over. I am quite satisfied that had any of them won I should not have been on." Other correspondence followed, but is not material for the question I have to decide. On the settling day the plaintiff paid the three bets in question to the winners of them. Had he not done so he would have been a "defaulter" within the meaning of the 3d rule of Tattersall's new subscription room; and if upon complaint made to the committee of the room, the committee adjudged him to be so, his membership of the room would thereupon have ceased, and he would have been thenceforward excluded from it, and by the 50th of the rules of racing made by the jockey club, if he had been reported by such committee as being a defaulter in bets, he would until his default had been cleared, have been subject to certain disqualifications mentioned in rule 49 of the rules of racing as to entering and running horses. The consequences of becoming a de-

faulter would therefore have been very serious to the plaintiff. For the defendant it was contended, first, that the authority to make the bets in question was subject to an express condition that the defendant should be informed by the plaintiff, by telegram delivered at the telegraph office before the race was run, that he was "on;" that is, that the bets had been made on his behalf; secondly, that if there was no such express condition, there was an universal usage and custom importing a condition to that effect into every authority conveyed by telegram to back horses, when a reply was paid: and that inasmuch as no reply telegram was handed in by the plaintiff for the defendant until a quarter of an hour after the race was run, the defendant was entitled to repudiate the bets as he did by his letter. The defendant further insisted that the bets were wagering contracts; that he had never given any authority to the plaintiff to pay them, and even if he had, that authority was revoked before the money was actually paid. I am of opinion, and I find as a fact, that there was no such express condition, nor is there any such usage or custom as contended for. The payment for a reply to a telegram requesting the plaintiff to back the horses, no doubt was an intimation to the plaintiff that the defendant desired to be speedily informed of what had been or what was about to be done on his behalf; but it did not constitute a condition to the plaintiff's authority to make the bets. As a matter of fact, where it can be done, a message in reply is no doubt usually handed in at the office before the race, but no universal custom or usage was established before me making it imperative upon the commission agent to do this as a condition to his binding his customer. Long and unreasonable delay in replying until after the race is run, and the event known, might under certain circumstances afford strong ground for suspecting that in fact the agent did not make the bets on behalf of his customer, and was fraudulently attempting to saddle him with the loss. There is however no evidence before me to justify such an imputation in the present case. It was clearly established to my satisfaction that the bets were made *bona fide* by the plaintiff for the defendant, in pursuance of the telegram, and that the plaintiff paid those bets in discharge of his liability to the persons with whom

they were made. The objections of fact therefore fail. This brings me to the consideration of the legal objections to the plaintiff's claim. I am of opinion that neither of them can be sustained. At common law, wagers are not illegal, and before the passing of 8 & 9 Vict., c. 109, actions were constantly brought and maintained to recover money won upon them. The object of 8 & 9 Vict., c. 109 (passed in 1845) was not to render illegal wagers which up to that time had been lawful, but simply to make the law no longer available for their enforcement, leaving the parties to them to pay them or not as their sense of honor might dictate. Accordingly it was by the 18th section enacted in these words: "All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void, and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager." There is nothing in this language to affect the legality of wagering contracts, they are simply rendered null and void, and not enforceable by any process of law. A host of authorities have settled this to be the true effect of the statute. I will mention only one or two. In *Fitch v. Jones*, 5 E. & B. 238, it was expressly so decided, Erle, J. saying: "I think that the defendant might without violating any law make a wager. If he lost he might without violating any law pay what he had lost." In *Hill v. Fox*, 4 H. & N. 359, the same learned judge said that the parties do not violate any law by making a bet; but the law will not assist the winner in enforcing payment of it. In *Ex parte Pyke; Re Lister*, 38 L. T. Rep., N. S. 923; 8 Ch. Div. 754, I observe the Master of the Rolls, at p. 757, is reported to have spoken of gaming or betting being illegal. I feel sure that the learned judge must have been misunderstood; and in his judgment in *Lynch v. Goodwin*, 26 Solicitor's Journal, 509, he expressly stated that a bet was void, but not illegal. But although the law will not compel the loser of a bet to pay it, he may lawfully do so if he please; and what he may lawfully do himself he may lawfully authorize anybody else to do for him; and if by his request or authority another person pays his lost bets, the amount so paid can be recovered from him as so much money paid to his use. In *Rosewarne*

v. Billing, 9 L. T. Rep., N. S. 441; 33 L. J., C. P. 55; 15 C. B., N. S. 316, the defendant had employed the plaintiff to make in his own name wagering contracts respecting mining shares, and the plaintiff accordingly made them and paid certain differences on such shares, and brought his action to recover from the defendant (his employer) the money so paid. In giving judgment for the plaintiff, Erle, C. J., said: "It is clear that though the defendant was not liable to pay the sums due under these wagering contracts, he might do so if he chose; and if a party loses a wager and requests another to pay it for him, he is liable to the party so paying it for money paid at his request." *Oldham v. Ramsden*, 44 L. J. 309, C. P., is to the same effect; so is *Ex parte Pyke; Re Lister, ubi sup.*, in which an appeal by the trustee under Lister's bankruptcy against the registrar for allowing a proof by Barrett for money lent and paid by him at Lister's express request in discharge of lost bets at Tattersall's was dismissed by the Court of Appeal. The request or authority to make such payments may be either expressed, or implied from usage or from the nature of the dealings between the parties themselves. If a person authorizes another to bet for him in his own name, an implied request to pay if the bets are lost is involved in that authority. For this too there is abundance of legal sanction. In *Bubb v. Yelverton*, 24 L. T. Rep., N. S. 263; L. Rep., 9 Eq. 471; 19 W. R. 739, which was a suit for the administration of the estate of the Marquis of Hastings, deceased, Lord Charles Ker claimed a sum of 850*l.*, for money paid for the marquis for bets made and lost on his account, it was held by Lord Romilly, M. R., that a request to bet implied an authority to pay the bet if lost, and that Lord Charles Ker was entitled to prove against the estate of the marquis for the amount paid; see also *Oldham v. Ramsden, ubi sup.*, *Rosewarne v. Billing, ubi sup.*, and lastly, *Lynch v. Goodwin, ubi sup.* I am not aware that this last case has been reported in any of the regular reports at present. In the present case I find as a fact, that at the time the defendant gave the authority to make the bets, he gave also an implied authority to pay them if they should be lost. The defendant however contended, that assuming wagering contracts not to be illegal, and that a person who employs another to bet gives that other implied

authority to pay, such authority may be revoked at any time before payment is actually made, and that it was in fact revoked in the present case. Upon the evidence before me, I am of opinion, and find as a fact, that the defendant did not revoke the authority to pay; on the contrary by settling the rest of the account, he seems to me to have confirmed that authority to pay whatever bets were honestly made and lost on his account, and the correspondence satisfies me that he only desired to raise the question whether these particular bets were honestly made or not. Assuming however contrary to my opinion, that there was a revocation in fact, I am of opinion such revocation was inoperative in law. I am not aware that hitherto this point has been judicially decided, although it was shortly mooted in *Rosewarne v. Billing*, *ubi sup.* I think it right therefore to state my reasons for the conclusions to which I have arrived. As a general rule a principal is no doubt at liberty to revoke the authority of his agent at his mere pleasure. But there are exceptions to this rule, one of which is that when the authority conferred by the principal is coupled with an interest based on good consideration, it is in contemplation of law irrevocable; that is though it may be revoked in fact, that is to say by express words, such revocation is of no avail. In *Smart v. Saunders*, 5 C. B. 895, Wilde, C. J., said: "The result appears to be that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable." See also Story on Agency, §§ 476, 477. In the present case the authority to pay the bets if lost was coupled with an interest; it was the plaintiff's security against any loss by reason of the obligation he had personally incurred on the faith of that authority to pay the bets if lost; the consideration for that authority was the taking upon himself that responsibility at the defendant's request. Previous to the making of the bets the authority to bet might beyond all doubt have been revoked, but the instant the bets were made, and the obligation to pay them if lost incurred, the authority to pay became, in my judgment, irrevocable in law. In other words the case may be stated thus: If a principal employs an agent to do a legal act, the doing of which may in the ordi-

nary course of things put the agent under an absolute or contingent obligation to pay money to another, and at the same time gives him an authority if the obligation is incurred to discharge it at the principal's expense, the moment the agent on the faith of that authority does the act, and so incurs the liability, the authority ceases to be revocable. The cases of *Hampden v. Walsh*, 33 L. T. Rep. (N. S.), 852; 1 Q. B. Div. 189; 45 L. J. 238, Q. B., and *Diggle v. Higgs*, 37 L. T. Rep. (N. S.), 27; 2 Ex. Div. 422, were cited for the defendant in support of his contention that the authority to pay was revocable. These cases do not assist him; they were actions brought against stakeholders to recover back deposits on wagers, and the revocation of the authority to pay over to the winner was before the money was paid over; in each of those cases the stakeholders must be taken to have received the deposits subject to the legal obligation to return them to the depositors if demanded back before payment over. The stakeholder's authority in those cases was coupled with no interest, and his position was unaffected by the revocation. Those cases are therefore not like the present, and do not fall within the exception to the rule I have referred to. The opinion I have expressed as to the irrevocability of the authority to pay lost bets applies only to cases where the agent by the principal's authority makes the bets in his own name so as to be personally responsible for them. If an agent were simply to make bets in the name of his principal, I am far from saying that the principal might not repudiate authority to pay at any time before payment was actually made, for his non-payment of bets made for him, and in his name, would not render his agent liable as a defaulter or subject such agent to loss or obloquy. It is not necessary however to decide this point now. The plaintiff's case may also, as it seems to me, be supported on this ground, that if one man employs another to do a legal act, which in the ordinary course of things will involve the agent in obligations pecuniary or otherwise, a contract on the part of the employer to indemnify his agent is implied by law. See Story on Agency, §§ 337-340, and I think it signifies nothing that such obligation is not enforceable in a court of justice if the non-fulfilment of it would entail serious inconvenience or loss upon the agent,

for he is not bound to submit to these things for his employer, if by doing that which was in contemplation of both at the time of the employment, he can avoid them, as he can in the case of bets lost, by paying them; and he is not bound, in my opinion, to incur the odium and consequences of repudiating his honorable engagements. As a matter of fact, I find that when the plaintiff in this case was employed to bet there was a tacit agreement on the part of the defendant to indemnify him against all the ordinary consequences of his so doing. In pleading, such a contract of indemnity might in substance be thus described: In consideration that the plaintiff as a turf commission agent would at the request of the defendant, and as his agent, make for him in his, the plaintiff's own name, certain bets, subject to and according to the usage of Tattersall's, the defendant promised that he would indemnify the plaintiff against all the consequences of making such bets according to such usages, etc. Many cases might be cited to show that such a contract, though made with reference to and in contemplation of wagering contracts, is not in itself a wagering contract. See *Bubb v. Elberton*, *ubi supra*; *Johnson v. Lansley*, 19 L. T. Rep. (O. S.) 158 and 168; 12 C. B. 468; *Beeton v. Beeton*, 33 L. T. Rep. (N. S.), 700; 1 Ex. Div. 13; 45 L. J. 230, Ex. The result is that if a person employs another to bet for him in the agent's own name, an authority to pay the bets if lost is coupled with the employment, and although before the bet is made the employment and authority are both revocable, the moment the employment is fulfilled by the making of the bet the authority to pay it if lost becomes irrevocable. For the reasons I have stated I am of opinion that the plaintiff is entitled to my judgment for the amount he claims, and I give judgment accordingly. On full consideration I have determined to allow such amendments (if any) in the pleadings as may be necessary to raise all the legal questions involved in the case, in order that it may be determined upon its true legal merits. The costs will follow the event of the action.

Judgment for the plaintiff.

COUR DE REVISION.

MONTRÉAL, 30 Avril, 1883.

Coram SICOTTE, J., DOHERTY, J., RAINVILLE, J.

COSSETTE V. LEDUC.

Maître et serviteur—Responsabilité.

Le maître est responsable à son employé du dommage qui lui advient par suite d'une installation vicieuse des machines ou appareils de son établissement.

La connaissance que l'employé aurait pu avoir du danger n'exonère pas le maître.

Lorsque l'employé a fait ce qu'aurait fait la plupart des hommes, il n'est pas en faute, et il n'y a pas lieu à réduire son indemnité pour négligence contributive.

SICOTTE, J. Dans les édifices servant à l'exploitation de son industrie, le défendeur avait disposé des voies de communication pour les fins du travail à faire. Il est constant que ces dispositions étaient défectueuses et dangereuses. Cette défectuosité a été cause de l'accident dont le demandeur, un des ouvriers engagés par le défendeur, se plaint, à raison des dommages qu'il a soufferts.

Il y avait apparence de sécurité pour le passage, mais c'était apparence, car le demandeur, vaquant au travail commandé, est tombé dans une cuve de tan en ébullition, et il a été gravement brûlé et blessé. Ces blessures l'ont rendu incapable de travailler pendant plusieurs mois.

Le jugement attaqué constate que les dommages sont de \$250; mais, déclarant qu'il y a eu négligence contributive de la part du demandeur, et procédant par compensation, il n'accorde au demandeur que \$125 de dommages.

Ce dernier réclame contre cette compensation, et prétend qu'il n'y avait pas lieu, sous les circonstances, à réduire les dommages, et qu'il n'y avait pas faute ou négligence dans ses agissements.

Le demandeur travaillait depuis quelques jours seulement. Il a fait ce que les autres faisaient; il s'est flé aux voies de communication préparées par le maître; et vaquant aux travaux commandés, il a connu, par l'accident et les souffrances qui en ont été la suite, que le chemin indiqué et suivi n'était pas sûr.

Le maître est-il seul responsable?

Il serait facile de discourir sur les relations que la justice, comme la loi, font entre le maître

et l'ouvrier. Mais il est aussi bien, sinon mieux, de présenter la doctrine des jurisconsultes, sanctionnée par les tribunaux. Voici comment Laurent (vol. 20, No. 475) l'explique :—“Tous les jours il arrive des accidents dans les fabriques ; l'industrie est comme une bataille, dans laquelle les faibles et les imprudents succombent. La Cour de Lyon a formulé le principe de la responsabilité dans les termes les plus généraux. Il est du devoir des chefs d'établissements industriels de pourvoir complètement à la sûreté des ouvriers qu'ils emploient, et ils sont responsables, à l'égard de ceux-ci, de tous les accidents et dommages qui peuvent provenir, soit des vices de construction ou du défaut d'entretien des machines et des appareils, soit de la négligence ou de l'inhabileté des préposés aux divers services de l'établissement. Ils ne peuvent décliner leur responsabilité qu'en cas de force majeure.

“Il y a une jurisprudence nombreuse sur ces tristes accidents, qui régulièrement coûtent la vie des ouvriers, ou les mettent dans l'impossibilité de travailler. La Cour de Lyon a jugé qu'il y avait responsabilité lorsqu'une administration de chemin de fer, en donnant à un ouvrier, pour le travail dont il est chargé, un outil nouveau dont le maniment est dangereux, ne lui a pas fourni des instructions suffisantes sur la manière de l'employer. L'accident survenu par suite de l'inexpérience de l'ouvrier, est en pareil cas imputable à la négligence du patron. Il y a un vieux adage qui dit que celui qui éprouve un dommage par sa propre faute, n'est pas censé être lésé, c'est-à-dire que quoique lésé, il n'a pas l'action en dommages. L'adage ne reçoit plus d'application, lorsqu'il y a une faute à reprocher à celui par le fait duquel le dommage est arrivé ; quand même la partie lésée serait aussi coupable d'imprudence. Il ne faut point perdre de vue le principe fondamental en cette matière, c'est que la faute la plus légère est une cause de responsabilité ; de là suit que l'imprudence de la victime du fait dommageable n'efface pas la faute de l'auteur, à moins qu'il ne soit établi que cette imprudence est la seule cause du dommage. No. 489. La question de responsabilité présente une autre difficulté :—Quand y a-t-il faute de la part de celui qui éprouve un dommage ? Doit-on appliquer à la partie lésée le principe que l'on applique à l'auteur du fait dommageable ? celui-

ci est tenu de la faute la plus légère, de la moindre imprudence, de la moindre négligence ; la sécurité des hommes commande cette rigueur ; entre la victime et le coupable, la justice prend parti pour la victime ; on ne peut pas apprécier avec la même sévérité l'imprudence ou la négligence commise par celui qui est lésé ; il est étranger au fait qui a causé le dommage, ce n'est pas à lui de prendre les précautions nécessaires pour qu'aucun dommage ne soit causé. Il faut donc revenir à la règle générale en matière de faute ; *s'il a fait ce qu'aurait fait la plupart des hommes, on ne peut pas dire qu'il soit en faute.*”

Laromblère, art. 1882 et 1883, No. 7.—“Celui qui ne fait pas ce qu'il devait faire, contrevient par cela même à son obligation. C'est, dit l'auteur, ce qu'enseignent les jurisconsultes Paul et Domat.”

Thompson “On Negligence,” pages 946 et seq.

“The legal implication is that the employer will adopt suitable instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable care and foresight ; and if he fails to do so he is guilty of a breach of duty, for the consequence of which, in justice and sound reason, he ought to be responsible. The servant has no control over the matter. He acts in subordination. He relies wholly on the judgment of the master, that the needed requirements are supplied. He has not the means nor the opportunity of knowing whether those furnished may be safe. He has the right to presume that all proper attention shall be given to his safety. Upon this ground, the English, the Scotch, the American law, all concur.

“In *Patterson v. Wallace*, Lord Cranworth says : ‘I believe, by the law of England, just as by the law of Scotland, a master employing servants upon any work, is bound to take care that he does not induce them to work under the notion that they are working with good and sufficient tackle, whilst he is employing improper tackle, and, being guilty of negligence, his negligence occasions loss to them.’ The same view of the law was taken by Lord Brougham.”

“In *Ryan v. Fowler*, it was decided ‘that the master was responsible to his servant for injuries received from defects in the buildings in which the services were rendered, of which the master knew or ought to have known.’”

Dans la cause de *Holmes v. Clarks*, la question de négligence contributive de l'ouvrier fut discutée, et nonobstant la connaissance du danger par ce dernier, il fut jugé contre le maître, pour les raisons qui avaient déterminé les décisions qu'on vient d'exposer. On lit ces paroles dans le rapport de l'opinion du Juge en chef Cockburn:—"Where a servant is employed on machinery from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means, to guard against and prevent any defects from which increased and unnecessary danger may occur."

Byles, J., disait, en terminant: "It is said that the verdict exempting the servant from the charge of negligence is inconsistent with the fact that he knew the machinery to be unfenced. But knowledge is only an ingredient in negligence. It may be that the knowledge of the servant induced him to use extraordinary care, which care was yet insufficient to preserve him from accident. Besides, a servant knowing the facts may be utterly ignorant of the risks."

Ces considérations sont en tout point applicables à l'espèce. Nous sommes d'opinion, comme le premier Juge, que le maître est coupable de négligence, et partant responsable. Mais nous ne voyons aucune négligence de la part du demandeur, dans l'accomplissement du travail qui lui incombait. Il a donc droit à une condamnation pour tout le dommage constaté.

Sur ce point, le jugement est modifié et réformé, et le demandeur est condamné à payer, non la moitié seulement du dommage, mais tout le dommage, qui est prouvé être d'au moins \$250, et les frais, tant en Cour Supérieure qu'en révision.

J. B. Brousseau, proc. du demandeur appelant.

D. Z. Gaultier pour le défendeur intimé.

P. X. Archambault, conseil.

SUPERIOR COURT.

MONTREAL, May 29, 1883.

Before TORRANCE, J.

BRAUDET et al. v. THE CORPORATION OF THE PARISH OF ST. IGNACE DU COTEAU DU LAC.

Electional List—Petition for Revision—Complaint in Writing—Resident.

A person paying the rent of a house in which he resides one day in the week is a tenant within

the meaning of the Quebec Election Act, 1875, sec. 2, ss. 5.

PER CURIAM. This is a petition complaining of the removal of the names of the petitioners from the Electoral Lists of the Parish. Objections as to form have been made, namely, that the removal had been by the Council, without the requisite complaints in writing: *Viger et al. v. The Town of Longueuil*, 2 Legal News, 267. The objection is good as to the removal of the name of Oscar Dunn. I would further say as to his case that he holds the land on which he seeks to qualify under a lease for over 9 years from the Crown, paying a rent of \$300 for the first year, increasing subsequently. Holding this lease, he is like a proprietor, C. C. 569, and therefore should be qualified.

As to the other petitioner, Godfrey L. Beaudet, I find that the petition against him was in form. On the merits, it is objected against him that he is not a tenant, *tenant feu et lieu*, in the words of the Electoral Act of Quebec, 1875, sec. 2, ss. 5. The evidence shows that three or four years ago Beaudet *père* made a donation of moveables, cattle and silver to Beaudet, petitioner; that the latter pays the servants, the house supplies, and is lessee of the house occupied by the family at \$80 per annum. He is there generally once a week, coming on Saturday, staying over Sunday and going to Montreal on Monday. At Montreal, he is a bookkeeper throughout the week, occupies a room in the East end at \$9 per month, and joins two others in the expense of his board, amounting for his share to \$6 or \$7 per month. If we look at the French expression "*feu et lieu*," the Dictionary of the Academy says that "*feu* means *un ménage, une famille logée dans une même maison*. Il y a cent feus dans ce village." It is said as a proverb, "*n'avoir ni feu ni lieu*," meaning "*être vagabond et errant ça et là sans aucune demeure assurée*." The dictionaries of Larousse and Bescherelle say the same thing. Assuredly the petitioner keeps house at Coteau. Is he also resident there though six-sevenths of his time is passed at Montreal? The English Election Law gives us some light as to what is sufficient residence in England. See *1 O'Malley & Hardcastle*, 107, 171, the North Allerton case. Also *Taylor & St. Mary, Abbott, Kensington*, 6 C. P. 309, where A had a lodging in one place where he resided six days out of seven, and in the other had lodgings where his wife and chil-

dren resided and where he spent one day in seven. This case appears exactly parallel. Also 6 C.P. 312, case of Bond & St. George, Hanover Square.

Mr. Monk for the corporation cited *inter alia* the case of the *Queen v. St. Pancras*, 2 L.R. Queen's Bench, 457. Giving to it the fullest consideration, still I think I am justified in holding that the petitioners are entitled to be on the Electoral list of the Parish of Coteau.

Petition granted.

Bisaillon for petitioners.

F. Monk for Corporation.

SUPERIOR COURT.

MONTREAL, May 28, 1883.

Before TORRANCE, J.

HEYNEMAN v. DAVIS.

Procedure—Option of jury trial.

Where the plaintiff has made option of a jury trial, he cannot withdraw it without the consent of the other party.

The plaintiff had made option of a jury trial by his declaration as his right was, and issue was joined accordingly. He now made a motion that his option be cancelled, leaving to defendant the same option if he chose to avail himself of it.

PER CURIAM. This option once made was binding on the other side, and should not be withdrawn or annulled without the consent of the other side.

The Court refuses the motion.

Atwater, for plaintiff.

W. H. Kerr, Q.C., for defendant.

CIRCUIT COURT.

MONTREAL, May 23, 1883.

Before MATHIEU, J.

NELSON v. THE CANADIAN DISTRICT TELEGRAPH COMPANY.

Duty of common carrier if he cannot find the person to whom the goods are to be delivered.

The defendants were a Company who undertook the delivery of parcels and messages. The plaintiff had entrusted them with a parcel addressed to one Beaulieu, a purser on board the Richelieu Company's steamer "Montreal". The message-boy, not finding Beaulieu there, left it with a man in charge of the Richelieu

Company's sheds on the wharf. The parcel did not reach its destination, but was lost.

The plaintiff was examined to prove the value, under authority of *Robson v. Hooker* (Stephens' Digest I., p. 209, and of 1256 C.C.), the defendant objecting that *Robson v. Hooker* came before the Code, which (1677) admitted this oath only to travellers. Constructive delivery was also alleged in defence, and that there was no evidence, especially as to the defendants being common carriers.

For plaintiff, the Code's definition of common carriers in Art. 1666, par. 2, was invoked; and, as to liability, Art. 1675, making them liable "for loss or damage of things entrusted to them," except by fortuitous events, etc. The commentary to this article is found under the similar one, 103 Code de Commerce, Sirey, where it is stated that the carrier must notify the sender and keep the goods or deposit them at the direction of the *tribunal de justice*. The plaintiff's counsel also cited Bédarride, *Chemins de Fer*, §419, and Chitty (Am. Ed. note to p. 80; pp. 155, 153).

MATHIEU, J. As to receiving the plaintiff's oath, even suppose it cannot be insisted on as *matière de droit*, still the court has a right to so complete the proof. There was sufficient proof that the defendants were common carriers; and they should be condemned, but without costs, as the plaintiff had not furnished them a statement of contents though demanded.

Stephens & Lighthall, for plaintiff.

Girouard, Warteles & McGibbon, for defendants.

GENERAL NOTES.

Chief Justice Sharswood, who recently retired from the Supreme Court of Pennsylvania, died in Philadelphia on the 26th May. The *Albany Law Journal* says he "was one of the most widely known and most respected of American lawyers, not only for his 37 years of judicial service, but for his important contributions to legal literature and the strength and dignity of his character. His mental force had not been abated by a broad general culture, and his capacity to grapple with the affairs of life had not been diminished by the lofty views which he held of his profession. He was at once one of the wisest and one of the ablest magistrates who have adorned the bench of this country, and he belonged to that school—old, indeed, but we hope not passed away—which regards the practice of the law not as a commercial pursuit, but as the noblest and most beneficent occupation of the human intellect. This great man was busy up to the last moment of his laborious life, striving to pay the debt which he thought he owed the profession already so heavily in debt to him."

The Legal News.

VOL. VI. JUNE 16, 1883. No. 24.

THE STAMP QUESTION.

The *Canadian Law Times*, referring to *Dickson v. Normandeau* (6 L. N. 136), says that the decision in *Bradley v. Bradley* (5 L. N. 425) is not to be taken as an index of either judicial or professional opinion in Ontario upon the subject matter of the case, and it adds: "We believe the point came expressly before the learned Chief Justice of the Common Pleas at *nisi prius* not many months ago, and was decided by him without any hesitation, according to the only enlightened view that could be taken of it," (i.e., allowing the note to be double-stamped.) It appears, therefore, that the decisions of the Ontario Courts are nearly unanimous upon the question, the opinions of County Court Judges, though often very respectable in point of ability, not ranking high as precedents. We have thought it well to refer to the point once more, as we printed in a recent issue the decision of a Superior Court Judge in a contrary sense.

PRIVATE BILLS.

The last issue of the *Canada Gazette* contains the following announcement with reference to applications for private bills:—

"And further, with respect to the House of Commons, it is ordered under Resolution of 20th April, 1883, that—

"All Private Bills for Acts of Incorporation shall be so framed as to incorporate by reference the clauses of the General Acts relating to the details to be provided for by such Bills;—special grounds shall be established for any proposed departure from this principle, or for the introduction of other provisions as to such details, and a note shall be appended to the Bill indicating the provisions thereof, in which the General Act is proposed to be departed from;—Bills which are not framed in accordance with this Rule, shall be re cast by the promoters, and reprinted at their expense, before any Committee passes upon the Clauses."

CARTER v. MOLSON.

We print in this issue the judgment of the Privy Council in *Carter v. Molson*. Their lordships say: "It may well be doubted whether the majority of the Queen's Bench have not given too much effect to the accident that the Codes did not come into force on the same day;" and they are disposed to say that the Codes should stand together and be construed together; but they do not find any way of escape from the difficulty occasioned by the omission of the Code of Procedure to enact the penalty of imprisonment on the person refusing to perform the duty which Art. 766 of the Code of Procedure expressly requires him to perform. The case must, therefore, be added to the category of omissions which a too hasty codification has created.

CONSOLIDATION OF STATUTES.

Our readers are aware that a Commissioner (Hon. J. Cockburn) has been engaged in the work of classifying the statute law of the Dominion of Canada. A report has just been issued, from which we glean some details respecting the progress of the work.

The Commission recites in substance "that whereas it has become necessary to revise and consolidate the Statutes of Canada, and whereas each of the Provinces of Canada before Confederation possessed Legislative authority over and passed laws in respect to matters now within the exclusive legislative control of the Parliament of Canada;

"And whereas the British North America Act continued these laws in force until repealed or altered by the Parliament of Canada, some of which have been so repealed or altered, some remain still laws of the Province in which they were enacted, some are local in their nature, not capable of being extended to the whole of the Dominion of Canada, while others might properly be extended to the whole, or other parts of Canada, and it is probable that some of them should be entirely repealed;

"And whereas certain schedules of Acts requiring examination have already been prepared, and whereas for the proper revision and consolidation of the Laws of the Dominion of Canada, it is necessary that further examination, collection and classification of the several Statutes of Canada should be made."

The Commission then proceeds to define substantially in the language following, what is required to be done by the Commissioner, that is to say :—

1. "He is to complete the Schedules already prepared as above mentioned.

2. "To examine the Statutes passed by the Parliament of Canada since the 1st of July, 1867.

3. "To collect therefrom all those enactments which are still in force.

4. To note the enactments of the old Provincial Statutes which have been repealed or altered.

5. "To classify all unrepealed enactments according to subjects, care being taken to distinguish those applying to the whole Dominion from those applying to one or more of the Provinces only.

6. "And generally to make such examinations, classifications and collections of the said Statutes as may be necessary and preliminary to the proper revision and consolidation thereof, and in accordance with such instructions as may be given from time to time in that behalf by the Honorable the Minister of Justice of Canada."

The schedules referred to as having been prepared before the issue of the Commission were nine in number, eight of them containing lists of the Public General Statutes of each of the Provinces passed before the dates of their respectively entering Confederation, except as regards the Provinces where consolidation of the Provincial Statutes had taken place, in which cases the consolidated enactments and the Statutes passed subsequent to such consolidation only are set forth in the schedules, and the ninth schedule containing a list of all the Public General Statutes of the Dominion of Canada, from the 1st of July, 1867, down to and inclusive of the Parliamentary Session of 1877.

The lists of the Statutes of the several Provinces are contained in the first eight schedules as follows :—

1. The Consolidated Statutes of Canada.
2. The Consolidated Statutes of Upper Canada.
3. The Consolidated Statutes of Lower Canada.
4. The Statutes of the Province of Canada.
5. The Revised Statutes of Nova Scotia (3rd

edition), and subsequent Statutes of that Province down to the 1st July, 1867.

6. The Revised Statutes of New Brunswick, of the year 1854, and subsequent Statutes of that Province down to the 1st of July, 1867.

7. The Revised Statutes of British Columbia of 1871, when that Province entered Confederation.

8. The Statutes of the Province of Prince Edward Island, down to the year 1873, when that Province entered Confederation.

The report proceeds to state :

"In each Province of the Dominion except one, there had been at least one general consolidation of the Provincial Statutes prior to such Province becoming a portion of the Dominion, but in the Province of Prince Edward Island there never appears to have been any such consolidation, although the Statutes of that Province have at different times prior to the entry thereof into Confederation, been revised, collected, classified and reprinted.

"The first eight schedules already mentioned, in addition to containing lists of the consolidated and subsequent Provincial Statutes passed prior to the confederation of the Provinces, respectively, purported to show which of these Statutes were of a purely Provincial character, and which of them related wholly or partially to subjects now within the jurisdiction of the Parliament of Canada, and also which of them had been repealed, superseded or amended either by subsequent enactments of the same Provinces passed prior to Confederation or by Legislation of the Parliament of Canada in any Session thereof between the 1st of July, 1867, and the 1st of July, 1877.

"In order to carry out the requirements of the Commission the first work devolving upon the Commissioner was the completion of the schedule already mentioned as the ninth, containing a list of all the Public General Statutes of Canada down to and inclusive of the last Session of Parliament, which he accordingly completed.

"The Commissioner, as the second branch of the work required under said Commission to be done, then examined the Statutes set forth in the last-mentioned schedule so completed and prepared as the result of such examination, a new schedule indicating in the proper columns thereof (in addition to its being a list of all the Statutes passed in each year between 1867 and 1882 inclusive,)

1. Those which were of a public general character.

"2. Those which had been repealed and the Statutes by which they had been repealed.

"3. Those which had become effete.

"4. Those which had been passed for only a temporary purpose.

" 5. Those which had been amended and by what Statutes the amendments were made.

" 6. And lastly, the Provinces of the Dominion to which the said Statutes were respectively applicable.

" The third requirement of the Commission was complied with as incidental to the preparation of the schedule last mentioned, indicating as it does which of the Statutes so examined remain in force.

" The schedule last-mentioned containing what has just been described, and complying with the second and third requirements of the Commission, involved necessarily the examination of over seven hundred Acts, or, in other words, of all the legislation of a public general character passed by the several Parliaments of the Dominion of Canada which have existed at any time between the 1st of July, 1867, and the dissolution of the last Parliament.

" The fourth branch of the work to be done under the Commission was carried out by the Commissioner concurrently with the examination of Dominion Statutes directed to be made as the second requirement, consisting as said fourth branch did of annotations made in the proper columns of each of the eight schedules first mentioned, indicating which (if any) of said Provincial Statutes therein-mentioned had been repealed, superseded or amended by Dominion legislation, and by which of such Statutes they were so repealed, superseded or amended.

" The first, second and fourth branches of the work having been so dealt with they formed the basis or material for 'the collection and classification of all unrepealed enactments' required as the third and fifth branches of the Commissioner's work, and these latter requirements, as well as the one last mentioned in the Commission, were partially complied with by the Commissioner in the following manner:—

" 1. By the preparation of an analytical digest or 'classification of all unrepealed Acts of a public general character, passed by the Parliament of Canada, and of Acts of the Provinces of Canada, Nova Scotia, New Brunswick, British Columbia and Prince Edward Island, passed by the Legislatures of these Provinces prior to their respectively joining the Confederation, and relating to matters subject under the British North America Act to the Legislative authority of the Dominion of Canada,' arranged so far as the order of subjects therein is concerned as nearly as practicable in accordance with the plan of arrangement or classification adopted in the Consolidated Statutes of Canada.

" This collection, classification or digest contains eleven chief titles and two hundred and fifty-seven subjects or titles of chapters, indicating all the subjects of legislation which, in the Commissioner's opinion, should be consolidated in order to form the Consolidated Statutes of the Dominion of Canada, and each and

every Statute or portion of a Statute affecting these subjects necessary to be considered and taken into account in carrying out the said Consolidation.

" In respect of some subjects of Dominion legislation, the Provincial Statutes passed before Confederation have not been repealed, no laws having been passed by the Parliament of Canada in respect of such subjects, and as a result according to the British North America Act of 1867 the Provincial laws remain in force.

" In respect of other subjects, although Acts have been passed by the Parliament of Canada, the old Provincial laws have not been expressly repealed, the enactments either superseding in effect the Provincial laws, or enacting that said Provincial laws are thereby repealed only so far as is inconsistent with the new enactments.

" In some of the Provincial Statutes passed before Confederation, the main subjects of which are still within Provincial legislative jurisdiction, clauses were enacted constituting felonies or misdemeanors, or otherwise affecting the criminal law, or affecting some other subject, which is now exclusively one of Dominion legislation, and although the Statutes themselves may have since Confederation been repealed by other Provincial enactments, as in some cases is the fact, so far as could thereby be done, these particular sections or clauses still remain law in these Provinces, and should be dealt with in carrying out the general consolidation.

" In preparing, therefore, the said classification or digest, and in order to call attention to all the enactments required to be considered in carrying out the consolidation, the plan adopted by the Commissioner was to indicate in the digest opposite to each subject therein and on the same page thereof,—

" First, in black ink, all the Statutes or portions thereof which clearly had to be consolidated under that particular subject, and when they applied to only one or more Provinces that also was indicated in the same coloured ink.

" Second, in red ink, all those statutes or portions of statutes relating to the same subject, but as to which it was uncertain whether they had been impliedly repealed or superseded, and which the Commissioner considered should be carefully examined in the course of the actual consolidation, mentioning also the Provinces to which the same were applicable.

" Second, after making the collection and classification in the form of an analytical digest of the unrepealed Statutes of the Dominion of Canada and the Provinces before their respectively entering Confederation, on subjects now under the legislative control of the Parliament of Canada, under their respective subjects, as already at length described, the Commissioner having been provided by your Department with the requisite number of the printed volumes of the Statutes, and also with suitable blank

books for that purpose, took from the printed volumes all the Statutes and portions of Statutes in each particular subject, and indicated opposite to each subject in the said classification or digest, and placed them in the blank books, so as to exhibit in these books not only the subjects of legislation to be consolidated and the chronological order and description of the Statutes relating thereto, but also the actual Statutes as amended from time to time, omitting, where any repeal had taken place, any clauses so repealed, and inserting the new clauses substituted therefor, or when the original clauses were amended only by subsequent legislation, then leaving the original clauses in the body of the Statute so transferred to the blank book, and placing on the opposite or subsequent pages thereof the amending clauses or enactments, with a reference in the margin of each page of the book, identifying the amendments with the original Act, in the margin; also, of the page at the beginning of each Statute so embodied in said books, the names of the Provinces to which these Statutes apply are annotated, as well as the amendments thereto, and the extension thereof, by any Statute to other Provinces.

"The Statutes, or portions of Statutes, indicated in red ink, in the classification or digest which require to be considered in the course of the consolidation, are also either taken bodily from the printed volumes containing the same and placed on the pages of these blank books opposite to those pages showing the Statutes to be consolidated, or else only the caption, chronological description and Province to which these Statutes, requiring to be investigated relate, are so placed on the opposite pages already described, when as was the case in respect to some of the Provincial Statutes it was impossible to procure any copies of the said printed volumes.

"The books just described are thirteen in number, of about three hundred and fifty pages each, containing "in extenso" as already set forth, all the legislative enactments indicated in the digest or classification on the subjects mentioned therein which constitute the matter for consolidation and consideration in the course of such consolidation.

"Each of said books is properly indexed by subjects and pages, so as to afford a ready means of reference to the Statutes relating to each subject contained in the said books respectively.

"The British North America Act of 1867, and the amendments thereto, are placed on the first pages of the first of said books, as these Acts will doubtless be frequently referred to in the course of the consolidation, and will, no doubt, be published in the opening portion of the first volume of the Consolidated Statutes of the Dominion.

"In consequence of the impossibility already referred to of procuring any copies of the printed volumes containing some of the Pro-

vincial Statutes requiring to be referred to, with the exception of the volumes in the Parliamentary Library, the Commissioner, in accordance with authority received from your Department, procured written copies to be made of some of said Provincial Statutes, which are required for reference or otherwise in the course of said consolidation.

"The Commissioner has the honor, therefore, to submit the above as the result of his labors up to this date under the Commission, to him directed, as before mentioned, that is to say:—

"1. The nine schedules completed as directed by the Commission.

"2. The new schedule already described of the Statutes of the Dominion of Canada.

"3. The classification or analytical Digest also fully described.

"4. And lastly, the thirteen books containing the material to be consolidated as the Statutes of the Dominion of Canada, or which requires to be referred to in the course of such consolidation.

"There remains still to be performed a very important portion of the work directed to be done under the Commission before the contemplated revision and consolidation take place, that is to say, the preparation and arrangement of the actual Statute law so collected and placed in the said books into the form of new chapters, as nearly as possible, as the same will appear in the completed volumes of the proposed Consolidated Statutes.

"This last branch of the work, which will require great care and consideration, is just being entered upon, but when it is completed, the actual revision and consolidation can then proceed without delay and with all the material therefor in a complete state of preparation."

SUPERIOR COURT.

[In Chambers.]

MONTREAL, May 31, 1883.

Before JETTÉ, J.

CRAWFORD et al. v. THE MORTON DAIRY FARMING & COLONIZATION CO. OF MANITOBA, (Limited.)

Commission Rogatoire—Suit pending in Manitoba.

This was an action instituted in the Court of Queen's Bench, Manitoba, from which a commission issued to take evidence at Montreal.

In the course of the *enquête*, objection being taken by defendants to the production of certain books called for by plaintiffs, and the commissioner having decided in favor of their production, his ruling was submitted for revision to a judge of the Superior Court.

The defendants urged that there was no juris-

diction in a judge or the Court here; that the 31 Vic., cap. 76, did not apply to the Province of Manitoba, and cited in support of this pretention, 1st, 33 Vic., cap. 3, sec. 2; 2nd, 34 Vic., cap. 13, sec. 1; that these two acts relate to the entry of Manitoba into the Dominion. Section 1 of the last named act directing that the acts passed in the first, second and third sessions of the Parliament of Canada, will apply to the Province of Manitoba the same as to the other four provinces, with the exception of the special acts mentioned in a schedule at the end of said act, and that Manitoba is therefore in regard to said chapter 76 of 31 Vic., in the same position as the four provinces confederated by the B. N. A. act.

The plaintiffs contended that when 31 Vic., cap. 76, was passed, Manitoba was in effect a foreign country and was not affected by it, and that in any case by the Imperial Act hereinafter mentioned the Court here had full jurisdiction.

The judge (Jetté, J.) gave his decision on the 31st May, 1883, as follows:—

“La Cour, en vertu des pouvoirs qui lui sont conférés par le Statut Impérial, 22 Vict., chap. 20, après avoir entendu les parties sur la demande de révision de la décision du commissaire enquêteur, S. Cross, écuyer, rendue le 11 d'avril dernier, et enjoignant au témoin Maltby de répondre à la question à lui posée, et de produire les livres et documents demandés, sous réserve de la dite objection;

“Confirme, en tous points, la dite décision, dépens réservés.”

Dunlop & Lyman for the plaintiffs.

Geoffrion & Co. for the defendants.

JUDICIAL COMMITTEE OF PRIVY COUNCIL.

April 18, 1883.

Present: — LORD BLACKBURN, SIR BARNES PEACOCK, SIR RICHARD COUCH, SIR ARTHUR HOBBHOUSE.

CARTER v. MOLSON.

Capias—Failure to file statement.

The Code of Civil Procedure having failed to impose any penalty whatever for not filing the statement required by Art. 766, the penalty provided by C.C. 2274, and by C.S.L.C., Ch. 87, Sec. 12, s.s. 2, cannot now be enforced.

PER CURIAM. This is an appeal from a judgment of the Court of Queen's Bench for Lower Canada, in the Province of Quebec; by which that Court, by a majority of three to two, reversed a judgment of the Superior Court of Lower Canada.

The judgment is in the following terms:

“6th March, 1882,

“Present: The Honourable Sir Antoine Aimé Dorion, Knight, Chief Justice; the Honourable Mr. Justice Monk, the Honourable Mr. Justice Ramsay, the Honourable Mr. Justice Tessier, the Honourable Mr. Justice Baby.

“The Court of our Lady the Queen, now here, having heard the Appellant and Respondent by their Counsel respectively, examined as well the record and proceedings had in the Court below, as the reasons of appeal filed by the Appellant, and the answers thereto, and mature deliberation on the whole being had;

“Considering that the Appellant, arrested on a *capias ad respondendum* at the suit of the Respondent, has been discharged, by giving security, under Article 825 of the Code of Civil Procedure, that he will surrender himself into the hands of the Sheriff, when required to do so by an order of the Court or Judge, within one month from the service of such order upon him or upon his sureties, and that in default such sureties will pay the amount of the judgment in principal, interest and costs. And considered that, by Article 766 and the following Articles of the Code of Civil Procedure, express provision has been made concerning the matters provided for by Chapter 87 of the Consolidated Statutes of Lower Canada and Article 2274 of Civil Code, as to the obligation of a debtor who, having been arrested on a *capias ad respondendum*, has been admitted to bail, to file a statement of all the property, real and personal, of which he is possessed, and that the provisions of Sections 12 and 18 of the said Chapter 87 of the Consolidated Statutes and Article 2274 of Civil Code have thereby been repealed under the provisions of Article 1360 of the Code of Civil Procedure.

“And considering that, although by the first paragraph of the above-mentioned Article 766 of the Code of Civil Procedure, a debtor who has been admitted to bail is bound to file the statement and declaration of all the property

of which he is possessed, according to Article 764 of the said Code, within thirty days from the judgment rendered in the suit in which he was arrested, it is not provided in the said Article, nor in any other article of the said Code, nor in any provision of law now in force, that in default of filing such statement and declaration, such debtor shall be imprisoned or be subject to any penalty whatsoever.

"And considering that the judgment of the Superior Court sitting at Montreal on the seventeenth day of September, one thousand eight hundred and eighty, by which it was ordered that the said Appellant should be imprisoned in the common gaol of this district for one year, is not, under the allegations of the petition on which said order was made, justified by law, and that there is error in the said judgment.

"This Court doth reverse the said judgment of the seventeenth day of September, one thousand eight hundred and eighty, and proceeding to render the judgment which the said Superior Court should have rendered, doth dismiss the petition of the said Respondent presented to the said Superior Court on the third day of September, one thousand eight hundred and eighty. And doth condemn the said Respondent to pay to the Appellant the costs incurred in the said Superior Court on the said petition, as well as those incurred on the present appeal.

"(The Honourable Justices Ramsay and Baby dissenting.)"

The question, which their Lordships have found to be one of considerable difficulty, depends on the true construction of the two codes of Lower Canada, the Civil Code, more particularly Art. 2274 and Arts. 2613 and 2614, and the Code of Civil Procedure, more particularly Art. 766 and those following it, and Art. 1360. There were careful and elaborate provisions for framing two codes in question; but notwithstanding all the precautions taken, there may be, and in fact in the present case there are, doubts as to what is the meaning of the language employed. And the Civil Code of Lower Canada, Art. 12, is "that when a law is doubtful or ambiguous it is to be interpreted so as to fulfil the intention of the Legislature, and to attain the object for which it was passed."

It is therefore material to inquire how and

why the two codes were enacted, so as to ascertain what was the intention of the Legislature, and what the object for which they were enacted.

First, by Statute 20 Vic., c. 43, which afterwards became the second chapter of the Consolidated Statutes of Lower Canada, Commissioners were appointed, who were directed (Secs. 4, 5, and 6) to reduce into one code, to be called the Civil Code of Lower Canada, those provisions of the laws of Lower Canada which relate to civil matters, and are of a general and permanent character, whether they relate to commercial cases or others, but excepting the laws relating to seigniorial or feudal tenure, and to reduce into another code, to be called the Code of Civil Procedure of Lower Canada, those provisions which relate to procedure in civil matters and cases, and are of a general and permanent character. They were directed to embody therein such provisions only as they held to be then actually in force. They might suggest such amendments as they thought desirable, but were to state them separately. And they were directed to follow, as far as might be, the arrangement of the Code Civil of France. It was provided that, as the Commissioners proceeded with their work from time to time, there should be an opportunity given to the Judges to review their work, and make suggestions to the Commissioners, who were to consider, but were not bound to adopt, their suggestions. And by Sect. 13 the Commissioners were required from time to time to incorporate with the proper portions of the said codes such amendments as the Governor in Council thinks it right to recommend for adoption by the Legislature after considering the reports of the Commissioners, and those of the Judges if any, but such amendments shall be carefully distinguished from the actual law. And then by Sect. 14, "When the said codes, or either of them, are completed, with such amendments as last mentioned, printed copies thereof, and of the reports of the Commissioners, and of the Judges if any, shall be laid before the Legislature, in order that such code or codes may be made law by enactment; and if it be found advisable that either of the said codes be completed and submitted to the Legislature before the other, the Civil Code of Lower Canada shall be the first so completed and submitted.

"2. Either House may propose any amendments to either code, but such amendments shall be proposed by resolutions, which may be passed by the one House and sent to the other for its concurrence, and shall be subject to amendment by the other, and be dealt with as a Bill might be until finally agreed to by both Houses, and shall then be communicated to the Commissioners, who shall with all possible despatch incorporate the substance of the amendments so agreed to with the proper code, which may then be passed as a Bill at the same or any other session."

The Civil Code was the first completed and submitted to the Legislature, and it was amended by resolutions agreed to by both Houses, but the Legislature did not quite pursue the course indicated by the latter part of Sect. 14, Subsect. 2. By 29 Vict., c. 41, sect. 2, the Commissioners were directed to incorporate the amendments with the Civil Code, adapting their form and language (when necessary) to those of the said code, but without changing their effect, inserting them in their proper places, and striking out of the said code any part thereof inconsistent with the said amendments.

Power was also given to the Governor to select any Acts and parts of Acts passed during the last and present sessions, and cause them to be incorporated. And power was given to the Commissioners to make verbal and formal amendments, and so soon as the said work of incorporation was completed the amended code was to be submitted to the Governor, who may cause a correct printed copy thereof, attested by his signature and that of the Provincial Secretary, to be deposited in the office of the Clerk of the Legislative Council.

Then by Sect. 6, "The Governor in Council may, after such deposit of the roll last mentioned, declare by proclamation the day on and after which the said code, as contained in the said roll, shall come into force and have effect as law, by the designation of 'the Civil Code of Lower Canada,' and upon, from, and after such day the said code shall be in force accordingly." The Governor in Council, by proclamation, named the 1st August 1866 as that day.

A precisely similar course was taken as to the Code of Civil Procedure of Lower Canada,

the Statute 29 & 30 Vict., c. 25, being in the same words as those of 29 Vict., c. 41, except that (Code of Civil Procedure of Lower Canada) is throughout substituted for (Civil Code of Lower Canada). The day fixed by the proclamation for this code coming into force is the 28th day of June, 1867.

So that there was a period of nearly ten months, during which the Civil Code was in force, before the Civil Code of Procedure came into force.

It seems implied in that part of the judgment which states "that there are express provisions in the Code of Procedure as to these matters," and that "the provisions of Sects. 12 and 18 of the Consolidated Statutes and Art. 2274 of the Civil Code have thereby been repealed under Sect. 1360 of the Code of Civil Procedure," that the majority of the Court of Queen's Bench put the construction on Art. 1360 of the Code of Civil Procedure, that it repealed not only all laws in force before the passing of either code, but also all parts of the Civil Code which touched procedure.

The literal meaning of the words "laws in force at the time of the coming into force of this code" includes the Civil Code, for, as already pointed out, the Civil Code came into force some months before the Code of Civil Procedure did; but their Lordships are scarcely prepared to hold that the intention and object of the Legislature was that when a matter is included in the Civil Code which might without impropriety have been included in the Code of Procedure, and an express provision is made in the Code of Procedure upon that particular matter, the provisions of the Civil Code are abrogated as being laws concerning procedure in force at the time when the Code of Procedure came into force. The two subjects from their nature overlap, and in the Code Civil of France, as well as in the Canadian Codes, much which might well be put into the one code is placed in the other. There seems nothing to prevent laws in both codes relating to the same subject from standing together, unless they are from their nature so inconsistent that the later enactment must be taken to repeal the earlier.

The 20th title of the Canadian Civil Code, relating to imprisonment in civil cases, is one which might have been placed under the head of procedure; and so might the 16th title of the French Code Civil, entitled, "De la Contrainte par Corps en Matière Civile," have been

placed in the "Code de Procédure Civile." But in neither the Canadian codes nor in the French Code has this been done.

The general intention and object of the Legislature seems to have been that the two codes should stand together, and be construed together, and it may well be doubted whether the majority of the Queen's Bench have not given too much effect to the accident that the codes did not come into force on the same day.

It is not, however, necessary to decide this, as, by a different chain of reasoning, the same result may be come to.

The preamble to the Statute 20 Vict. c. 43, which afterwards became the consolidated Statutes, Chap. 2, is this:—

"Whereas the laws of Lower Canada in civil matters are mainly those which at the time of the cession of the country to the British Crown were in force in that part of France then governed by the custom of Paris, modified by provincial statutes, or by the introduction of portions of the law of England in peculiar cases; and it therefore happens that the great body of the laws in that division of the province exist only in a language which is not the mother tongue of the inhabitants thereof of British origin, while other portions are not to be found in the mother tongue of those of French origin. And whereas the laws and customs in force in France at the period above mentioned have there been altered and reduced to one general code, so that the old laws still in force in Lower Canada are no longer reprinted or commented on in France, and it is becoming more and more difficult to obtain copies of them, or of the commentaries upon them. And whereas the reasons aforesaid and the great advantages which have resulted from codification, as well in France as in the State of Louisiana, and other places, render it manifestly expedient to provide for the codification of the civil laws of Lower Canada."

From the preamble and the whole scheme of the legislation, their lordships think that it was one main object of the Legislature to make the codes as one may say self-contained. This object, however, has been apparently lost sight of in several places, and, amongst others, in the Art. 2274 of the Civil Code, which is in the following words:—

"Any debtor imprisoned or held to bail in a cause wherein judgment for a sum of 80 dollars or upwards is rendered, is obliged to make a statement under oath, and a declaration of abandonment of all his property for the benefit of his creditors, according to the rules and subject to the penalty of imprisonment in certain cases provided in Chap. 87 of the Consolidated Statutes for Lower Canada, and in the manner and form specified in the Code of Civil Procedure."

This cannot be understood, without reading and construing the statute referred to in order to see what rules and what penalties of impris-

onment were provided by that statute, and then determining which of them were kept alive by this Article; for, though this Article does contain an express provision on at least part of Chap. 87, and so by Art. 2613 and 2614 of the Civil Code does abrogate at least so much of Chap. 87, yet it seems impossible to deny that the Legislature did intend, at all events until the Code of Civil Procedure should come into force, to re-enact by reference to the abrogated statute some penalties, and apply them to the things specified in Art. 2274. And there is great difficulty in doing this. For though Chap. 87, s. 12 (1) does, in certain cases included in Art. 2274, but not quite co-extensive with it, require a debtor against whom judgment for 80 dollars or upwards has been rendered to file a statement of his property and creditors, and a declaration of his willingness to abandon the property in his statement mentioned to his creditors, and by Sect. 12 (2) does impose penalties on a defendant neglecting to file such statement, yet there are no penalties co-extensive with Art. 2274, and there certainly are many penalties which, by Chap. 87, s. 18, are imposed upon debtors who have not been arrested, against whom a judgment has gone in a commercial cause, which cannot on any construction be kept alive by Art. 2274. Those difficulties are all removed if Art. 2274 is read as meaning "according to the rules and subject to the penalty provided in certain cases in Chap. 87, until the Code of Civil Procedure comes into force, and then in the manner and form specified in the Code of Civil Procedure."

It is not to be denied that this is introducing words not to be found in the enactment, and so far is objectionable. But their Lordships think that Art. 2274 of the Civil Code shews an intention on its face to hand over the whole of its subject matter to be dealt with by the provisions of the Civil Code of Procedure, or if that intention cannot be found on its face, then that the law contained in that enactment is "doubtful and ambiguous," and though not without some doubt and difficulty, they think that the object and intention of the Legislature is such as to justify this construction.

If it is adopted, all difficulty vanishes. The articles of the Code of Civil Procedure do impose many penalties, but they do not impose the penalty of imprisonment for a year on the person refusing to perform that duty which he is by the express terms of Art. 766 bound to perform.

The question how he is to be compelled to do so does not arise on this appeal. It is enough to say that he is not liable to imprisonment for a year.

Their Lordships think that the appeal must be dismissed. They will so humbly advise Her Majesty.

The Appellant must pay the costs of this appeal.

The Legal News.

VOL. VI. JUNE 23, 1883. No. 25.

THE MONTREAL COURT HOUSE.

The Chief Justice of the Queen's Bench, in his charge to the Grand Jury at the beginning of the June Term, made a practical suggestion with reference to the Court House, which we feel sure the bar would be glad to see carried out. "I would also call your attention," said his Honour, "to the want of accommodation of the present building, for the convenient despatch of the constantly increasing judicial business of this district; small rooms are inconveniently crowded with clerks; hundreds of records affecting interests of great magnitude, and in many cases involving the fortunes of many, are from want of proper vaults left unprotected against the danger of fire, and even the judges of the several courts are complaining of insufficient room accommodation for the discharge of their duties. Changes have been made which have only proved to be a very partial and temporary relief, and suggestions have been made of other changes which could hardly make this building sufficient for all the purposes for which it was designed. While it appears to be admitted on all hands that the revenue derived in this district from the taxes on judicial proceedings is far in excess of the requirements for the maintenance of this building, there would seem to be no reason why a portion of those revenues should not be appropriated to the erection of buildings exclusively for the holding of criminal courts and the offices of the officers connected with the administration of criminal justice, leaving the present building for the exclusive use of the Civil Courts and the offices connected therewith." It may be remarked that in Toronto the business is conducted in separate buildings, Osgoode Hall being appropriated to civil business.

INTERNATIONAL COURTESY.

The Lord Chief Justice of England set an example to be commended and followed, at the trial of the dynamite conspirators. Mr. Matthison, counsel for Bernard Gallagher, one

of the accused, in the course of his address to the jury, contended that because his client was a resident of Brooklyn, he could not be judged by the same standard as an Englishman. "It was a matter of common knowledge," he went on to say, "that plots existed in America for the manufacture of dynamite for use against England, almost with the connivance of the American Government."

Mr. Clarke and Mr. Rowlands protested against this language, and declared there was no proof that such was the case. Mr. Justice Brett declared that counsel had no right to make such a remark. He said there was no proof of the existence in America of plots or connivance thereat on the part of the Government of that country. The Chief Justice also rebuked Mr. Matthison. He said:—"I think it is only due to our friendly relations with a great Government that you unreservedly withdraw your statement." Mr. Matthison then said he would gladly accede to the ruling of the court.

BENCH AND BAR.

The N. Y. *Daily Register*, in reply to such complaints as that of the *Ohio Law Journal*, (*ante*, p. 153), says: "It does not lie in the mouth of the bar to criticise the verbosity of opinions, for they are greater offenders than the bench in this respect. . . . As to the bar we must acknowledge, even speaking in the character of an attorney, that appeal books are often stuffed with more prolix, irrelevant and tedious matter than ever incumbered an opinion; and the judges who are compelled to wade through such records to prepare to write an opinion would be more or less than human did they not often catch the infection of diffuseness and echo a slight share of the redundancy, the tautology, the pleonasm, the repetitions, the digressions, and all the ingenious long-windedness so natural to the bar. Our native resources of wordiness have been wonderfully enhanced by the easy and profitable reproduction of easy but unprofitable prolixity which the system of stenographic notes has introduced."

INTEREST ON HYPOTHECARY CLAIMS.

To the Editor of the LEGAL NEWS:

SIR,—Art. 734 of the Code of Procedure says that "interest and arrears of rents preserved by registration of a claim, are collocated in the

same rank with such claim, up to the day on which the immovable was adjudged."

Under this article Mr. Marchand, who so very ably and carefully prepares the judgments of distribution, considers himself bound, even if there be money enough to pay in full, to refuse a first hypothecary creditor all interest after the date of the sale of the property. There are many cases where, for many reasons entirely beyond the control of the creditor, years may elapse between the date of the sale and the final homologation of the report when the creditor is actually allowed to touch his money. In a case which has just terminated, a client of mine, without any fault of her own, has been made to lose eighteen months' interest on a first mortgage claim, which loss represents to her a large amount which she can ill spare.

That such is the law under Art. 734 it would probably be useless to question, for I take it that the point must have come up and received a thorough examination. But whether it has or not, the absurdity and injustice of the whole thing is apparent, and when we have legislators constantly pottering and tinkering at our Code, why cannot one of them be found to put an end to this crying shame?

ADVOCATE.

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, May 31, 1883.

Before SICOTTE, RAINVILLE, LORANGER, JJ.

FRANCIS V. CLEMENT *ès-qual*.

Alimentary allowance—Action by son of age.

Held (reversing the decision of the Superior Court, 6 L. N. 133,) where a claim was made by a natural son aged 25, against the curator of his mother, an unmarried woman and an interdict, for an alimentary allowance, and it appeared that the mother was possessed of means more than sufficient for her maintenance, that the son was entitled to a reasonable allowance, especially in view of the fact that such allowance might be paid without trenching on the principal of his mother's fortune, or interfering with the rights of the plaintiff's minor children.

The conclusions of the declaration were in the following terms:—

"A ces causes le demandeur conclut à ce qu'il soit déclaré être l'enfant naturel de la dite

Dame Mary Power et avoir été reconnu comme tel par cette dernière, et qu'il a droit en conséquence de vivre avec sa famille et suivant sa condition à même les revenus de sa dite mère, à ce que le défendeur *ès-qualité* soit condamné à payer au demandeur par paiements de trois mois en trois mois, ou de telle manière qu'il plaira à cette Cour fixer, la somme de \$2,000 par année, représentant les revenus de sa mère, la dite Dame Power, non absorbés par les frais d'administration et dépenses de cette dernière, ou toute autre somme que cette Cour jugera convenable sous les circonstances, pour permettre au demandeur de vivre avec sa famille suivant sa condition, le tout avec dépens, distraits, etc."

The judgment in review was as follows:—

"Considérant que le demandeur est le seul enfant de Mary Power, et qu'il est prouvé que cette dernière l'a reconnu comme tel; qu'il est sans moyens pour subvenir à son existence ainsi qu'à celle de sa femme et de leur enfant;

"Considérant que la fortune de la mère du demandeur est considérable, donnant un revenu de près de \$1,500, dont l'administration est entre les mains du défendeur en sa qualité de curateur à Mary Power, interdite pour démence, et dont les besoins ne peuvent requérir au-delà de \$500;

"Considérant que, sous les circonstances, cette fortune, déduction faite de ce qui est nécessaire pour le maintien de la mère, est quant aux revenus, chose dont la destination est légalement celle du maintien du demandeur et de sa famille;

"Considérant que s'il est constant que le demandeur devrait employer son travail et l'instruction qu'il possède d'une manière plus sage, en se dévouant à un travail plus efficace et pratiquant une sobriété plus parfaite, il est également vrai que l'illégitimité de sa naissance est raison qui lui donne un droit plus rigoureux contre ses auteurs, comme il accorde à ces derniers un pouvoir moins rigoureux contre lui;

"Considérant que la preuve constate que le demandeur s'est de beaucoup réformé et qu'il y a lieu d'espérer une réforme plus grande; et que dans tous les cas sa femme et son enfant sont dans le besoin et dans la détresse, et ont droit à des secours sur et à même cette fortune du défendeur vu la négligence de ce dernier à les fournir;

"Considérant que les intérêts futurs de la famille ne doivent pas être sacrifiés, pour subvenir aux besoins du moment d'une manière trop libérale et propre à encourager le demandeur dans une imprévoyante inertie, mais qu'il est juste et d'accord avec les droits et les intérêts de tous, de donner assistance au demandeur et à sa famille, dans une sage mesure et avec une prévoyance intelligente;

"Considérant qu'en employant les revenus à faire une ample provision pour le maintien de la mère et une assistance convenable pour celui du demandeur et de sa famille, il reste-

rait à placer chaque année une somme qui faciliterait plus tard l'établissement des enfants ;

"Considérant que pour obtenir ces fins, il peut être accordé au demandeur une allocation annuelle de \$600, sauf à l'augmenter s'il y avait lieu, payable chaque mois par paiements de \$50, qui seront versés moitié ès-mains de la femme du demandeur et moitié ès-mains de ce dernier ; et en entier ès-mains de la femme sur ordonnance du juge, sur demande à cet effet par le curateur, si la mauvaise conduite du demandeur justifiait la chose ;

"Déclare qu'il y a erreur dans le jugement de la Cour Supérieure en date du 21 avril 1883, et rendant le jugement que la Cour Supérieure aurait dû prononcer, accorde au demandeur à titre de provision alimentaire pour lui et sa famille, la somme de \$600 par année, à être payée par paiements de \$50 le premier de chaque mois à compter du _____ ; autorise le curateur à verser cette somme ès-mains de la femme du demandeur, comme expliqué ci-dessus ; condamne le défendeur ès-qualité à payer les frais tant en Cour Supérieure qu'en Cour de Révision," etc., etc. Judgment reversed.

Geoffrion, Rinfret & Dorion for plaintiff.

Pagnuelo & St. Jean for defendant.

SUPERIOR COURT.

MONTREAL, April 30, 1883.

Before TORRANCE, J.

MANTHA et al. v. SIMARD et al.

Insolvency—Déconfiture.

In order to prove insolvency or déconfiture, it must be shown that the assets of the debtor are less than his liabilities.

This was a demand to recover \$871.43, amount of four promissory notes made by defendants for \$669.71 in all, and \$1.72 for goods.

The notes were not due on the 19th January, when the action began, and the plaintiffs to maintain their demand had to allege insolvency, and also to prove it, on the part of the debtors.

PER CURIAM. The chief issue is the question of insolvency. The defendants certainly intimated that they could not then meet their engagements. But the fact to be established by the plaintiffs was insolvency, which is the same thing as *déconfiture*, *Ancien Denisart vo. Déconfiture*. "*Déconfiture*" means that the assets of a man are less than his liabilities:—C. P. 180. Hector Cadieux, the agent of plaintiffs, says:—"Il m'a dit qu'il était incapable de rencontrer ses affaires, qu'il avait perdu trop d'argent. . . . Il ne m'a pas dit qu'il ne pouvait pas payer dans le moment, mais qu'il était incapable de faire face à ses obligations,

qu'avec du délai, il liquiderait lui-même et qu'il paierait lui-même. . . . Je lui ai demandé s'il pourrait nous payer avec du délai: il m'a répondu: qu'il ne savait pas, qu'il liquiderait."

It is evident to the Court that the process of liquidation was necessary to establish insolvency, and meanwhile the Court holds that insolvency has not been proved, and therefore that the action should be dismissed save as to the sum of \$1.72. As to costs, seeing the circumstances of the case, the Court will give no costs.

Prefontaine, for plaintiffs.

Lafontaine, for defendants.

SUPERIOR COURT.

MONTREAL, June 18, 1883.

Before LOBANGER, J.

HALL v. McSHANE.

Charter Party, Interpretation of—Opening of Navigation.

A charter party stipulated that a steamship in England should "with all convenient speed sail "and proceed to Montreal, to arrive there "between opening of navigation, 1879," etc. The vessel arrived 18th May, navigation having been open on the 1st May. Held, that the stipulation as to date of arrival was not a condition precedent, and further, that no specific time being fixed, arrival on the 18th May was within the terms of the contract.

The action was by the owners of a steamship, claiming for "dead freight," under the following circumstances:—The defendant, through his agent, David Shaw, contracted with the plaintiffs, owners of the steamships *Cervin* and *Bernina*, to charter these vessels for the transportation of cattle from Montreal to London during the season of navigation of 1879. The charter party was dated Glasgow, 17th January, 1879, and contained the following conditions and stipulations: "That the said ships shall, "with all convenient speed, sail and proceed "to Montreal, to arrive there *between opening of "navigation, 1879, and thereafter run regularly "and with all despatch between Montreal and "London; to be despatched from Montreal in "regular rotation with other steamers under "charter to same charterer, up to 1st October, "1879," etc.*

The plaintiffs alleged that in accordance with this contract, the steamer "*Cervin*" proceeded

to Montreal, and arrived there May 18th, 1879; the defendant was notified on the 1st May that the vessel was on her way to Montreal; that on her arrival the defendant was further notified of her readiness to receive cargo, but he refused to load. He was further protested on the 22nd and 23rd May that the cattle spaces on the vessel would be let at the best rates obtainable, and that he would be held responsible for any loss which the plaintiff might sustain from his refusal to carry out the contract. But the defendant having persisted in his refusal to load the vessel, the plaintiffs were compelled to look for another cargo, which they obtained on the 28th May. The latter brought them only £1,052 Stg., whereas if the defendant had loaded as agreed, they would have received £1,770 Stg. The action claimed the difference between these sums.

The defendant admitted the charter party, but pleaded several pleas which it is unnecessary to set out, as the court was of opinion that they were wholly unsupported by evidence.

The only plea which gave rise to any difficulty was the fourth. By this plea the defendant said that, according to the agreement which he made with the plaintiffs, the first steamer was to arrive in the Port of Montreal at the opening of navigation, 1879, etc.; that the condition as to arrival of one of the steamers at the opening of navigation within a reasonable time was a condition precedent, and a warranty binding on the plaintiff, which, not being fulfilled, the defendant had a right to throw up the agreement; that the season of navigation for 1879 opened on the 1st of May, vessels from sea having on that day arrived in Port; that the "Cervin" arrived only on the 18th May, when the defendant's object was frustrated.

The answer to this was that the charter party contained no specific time as to the date of departure from London, nor of arrival in Montreal; the vessel was merely "to arrive between the opening of navigation," which was a vague expression, and did not constitute a condition precedent to the contract, but only a stipulation, the non-performance of which would result in a claim for damages; and that the defendant not having asked any damages, nor having offered by his plea to compensate the claim of the plaintiff by any damages re-

sulting from the delay, the plea was no defence to the action.

PER CURIAM. The "Cervin" arrived in the harbour at 1 p.m. on the 18th of May, and the defendant had been notified, in accordance with the charter party, of her departure on the 1st of May. Am I to declare now that because she had not arrived on the 15th, the charter party must be declared absolutely null? I do not think that the law or the facts of the case warrant such a course. It seems evident that the defendant did not intend to carry out his contract, for as far back as the 19th of April he wrote to the plaintiffs' agent in these terms: "As already having notified your manager verbally some two months ago, that I would nor could not load any of the steamers chartered from you, as the prohibition act passed in England, and also the prevention of our Canadian Government, in allowing the cattle which I had arranged for in Chicago to load the steamers coming into Canadian ports, it is impossible for me to carry out the contract made with you." This letter was received a few days only before the opening of navigation. The defendant adhered to this resolution, and Mr. Shaw, the plaintiffs' agent, says that on the defendant receiving, 1st May, a notice that the vessel was on her way to Montreal, he (the defendant) persisted in his refusal to provide a cargo. If it be true, as the defendant pretends, that he had in the port of Montreal cattle ready to be shipped, and which he says were shipped by another vessel on the 11th May, how is it that he gave the plaintiff no notice of the fact? The defendant apparently thought at one time that, owing to the prohibition put upon the exportation of American cattle, he would be relieved from his contract. It having turned out that the prohibition did not interrupt the cattle trade, the defendant endeavoured to escape by relying on the late arrival of the vessel. But in any case he should, when notified of the departure of the ship on the 1st May, have protested that she could not arrive in time. He did not protest then nor at any subsequent period, and it is only when suit is brought that he raises the objection. On the whole I am of opinion that this plea must be dismissed, and the plaintiff is entitled to judgment.

Abbott, Tail & Abbotts for plaintiff.

Kerr & Carter for defendant.

COURT OF QUEEN'S BENCH.

(Crown side.)

MONTREAL, June 15, 1883.

Before DORION, C. J.

REGINA V. SELLARS.

Libel—Proof of publication.

Evidence that the defendant in a criminal prosecution is, at the time of the trial, editor and proprietor of the journal in which the libel was printed, is insufficient. The defendant should be proved to have been proprietor or publisher at the date of publication.

It being objected, at the close of the case for the prosecution, that there was no proof that the defendant was proprietor or publisher of the journal at the date of publication, the Court allowed the witness on this point to be recalled, in order to verify his evidence. After deliberation the presiding Chief Justice charged the jury as follows:—

Gentlemen,—You have seen the libel and heard it read. Now, I must tell you that it is essentially necessary that the prosecution should have proved that the defendant was, on the 22nd of June, 1882, the date of the publication of the libel, either the proprietor of the paper or the publisher of the article complained of. It has been in some way proved that at one time a Robert Sellars gave an affirmation as required by law, and registered it in the Clerk of Sessions' office, declaring himself to be the proprietor of the paper in question, the *Canadian Gleaner*. But it has in no way been proved that the Robert Sellars who made that affirmation was the Robert Sellars who is now prosecuted in the present case. The affirmation was given a long time ago; and it was necessary for the prosecution to show that that was the Robert Sellars who is prosecuted in this case; or in the absence of such evidence it was necessary to show by other legal evidence that the Robert Sellars now prosecuted was the proprietor or publisher at the time of the publication of the libel on the twenty-second of June, 1882. It has been proved by Mr. C. P. Davidson that Robert Sellars, the defendant, is the proprietor of the paper at this date; but there is no proof that he was proprietor or publisher of the paper when the libel imputed to him was published a year ago. Now, this is not a question for a jury. It is a question of law for the judge to decide whether there is evidence or no evidence. When there is evidence to go to the jury then they have to decide whether it is sufficient or not, but it is a matter for the Court to decide whether there is evidence or not. It is my duty, in this case, to say that there is no evidence to go to the jury of the defendant being

the proprietor or publisher at the date of the libel, and it will be your duty, gentlemen, to acquit the defendant, for that reason. You do not go into the merits of the case. There is no other point except the one I am putting before you for you to express your opinion upon; but you must decide by the direction of the Court upon the law question, that there is no evidence, and acquit the defendant in this case accordingly, of the accusation brought against him.

THE LICENSE BILL.

The following is a *resumé* of the Act respecting the sale of intoxicating liquors, as finally passed. The preamble of the bill reads as follows:—

"Whereas, it is desirable to regulate the traffic in the sale of intoxicating liquors, and it is expedient that the law respecting the same should be uniform throughout the Dominion, and that provision should be made in regard thereto for the better preservation of peace and order; therefore her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada enacts, etc." Upon these broad and comprehensive grounds the Government adopted the bill.

1. The first clause states that the Act may be cited as the Liquor License Act, 1883.

2. The second clause is the ordinary interpretation clause. According to it, "Board" means the Board of License Commissioners; "District" means a License District; "Electors" means those entitled to vote at an election for a member of the House of Commons; "Inspector" means an inspector of licensed premises, and includes every person having the authority of such inspector; "Justice," or "Justices," means justice of the peace; "Hotel License" means a license authorizing the holder thereof to sell and dispose, under the provisions of this Act, of any liquor in quantities not exceeding one quart, which may be drunk on the premises; "licensee" means a person holding a license under this Act; "licensed premises" means the premises in respect of which a license under this Act has been granted and is in force, and shall be construed to mean and extend to every room, closet, cellar, yard, stable, outhouse, shed, or any other place whatsoever of, belonging, or in any manner appertaining to such house or place; "liquors," or "liquor," shall be construed to mean and comprehend all spirituous and malt liquors, and all combinations of liquors and drinks, and drinkable liquors which are intoxicating; "magistrate" means the judge of the sessions of the peace, police, stipendiary, or sitting magistrate, recorder, justice or justices of the peace, or commissioner of a parish court who may have jurisdiction to entertain a complaint in respect of a contraven-

tion of the provisions of this act; "public bar" or "bar" means and includes any room, passage, or lobby in any licensed premises open immediately to any street, highway, public place or public thoroughfare, and into which the public may enter and purchase liquor; "saloon license" means a license authorizing the holder thereof to sell and dispose any liquors, not exceeding one quart, on the premises therein specified, and which may be drunk on the premises.

3. The third clause provides that nothing in this Act shall apply to manufacturers of native wines from grapes grown in Canada, and who sells such wines in quantities not less than one gallon, or two bottles of not less than three half-pints each, at one time at the place of manufacture. Nor to any person holding a license as an auctioneer, selling liquor at public auction in quantities of not less than two gallons at any one time.

4. The fourth clause relates to license districts, which are to be established by the Governor-in-Council, who also has power to alter and redefine the same. As far as possible such license districts are to be coterminous with existing and future counties, or electoral districts or cities.

5. The fifth clause deals with the license commissioners. This board is to be composed of three persons for each license district, the first of whom is to be, in the Province of Ontario, a County Court judge, or a junior judge of a county, as may be selected by the Governor-in-Council. In Quebec he is to be either the judge of a Judicial District, a judge of Sessions of the Peace, the Prothonotary, or a registrar of deeds, as the Governor-in-Council may appoint; in British Columbia such one of the judges as the Governor-in-Council may appoint; in the other provinces, the same as in Ontario.

The second commissioner is to be the warden of the county or mayor of the city. Where there is both a warden and a mayor having jurisdiction within the license district, the warden is to be second commissioner.

The third commissioner is to be appointed by the Governor-in-Council, and is to hold office for one year. The judge is to be chairman of the board, and two commissioners to be a quorum.

6. The sixth clause deals with license inspectors, of whom a chief inspector and one or more inspectors are to be appointed by the board from time to time for each district as the board may see fit. Each licence inspector is to give such security as the board may require for the performance of his duties, and for the payment over of all moneys received. Their salaries to be fixed by the board subject to the approval of the Governor-in-Council.

7. The seventh clause relates to licenses, and it provides that the Governor-in-Council may direct the issue of licenses on stamped paper

for (1) hotel licenses, (2) saloon licenses, (3) shop licenses, (4) vessel licenses, and (5) wholesale licenses. These licenses are to be signed by the Minister of Inland Revenue, and are to remain in force to the 30th of April following the date thereof. Hotel and saloon licenses have been already defined. A "vessel license" authorizes the master of a vessel, being a vessel by which passengers are conveyed from one place to another within or beyond the Dominion, to sell or dispose of liquor during the passage of the vessel between such places to any passenger on board such vessel, provided always that it shall not permit the selling or disposing of any liquor except at the regular meals, and then only to actual passengers; and provided further that it shall not authorize the opening or keeping of a bar or place on board such vessel where liquors are sold or drunk.

A "wholesale license" authorizes the licensee to sell liquor in his warehouse or shop in quantities of not less than two gallons. With respect to bottled ale, porter, beer, wine or other fermented or spirituous liquor, each such sale shall be in quantities not less than one dozen reputed quart bottles. Liquors sold under a wholesale license are not to be consumed on the premises.

8. The eighth clause provides that vessel licenses shall be issued under the authority of the board for any district to or from any port in which the vessel sails or at any port in which she calls. It also provides that all the licenses given under this Act shall be subject to the payment of such duty as the Legislature of the province may impose for the purpose of raising a revenue for provincial, local, or municipal purposes.

9. The ninth clause provides that the board shall hold a meeting during the month of February, 1884, to regulate the conditions and qualifications of applicants for hotel, saloon and shop licenses, to regulate the hotels, saloons, and shops to be licensed, and to fix the duties and powers of the inspectors. Such regulations to be published within ten days.

10. The tenth clause provides for a meeting of the board in the month of March, for the purpose of taking into consideration all applications for certificates for such licenses as are to be granted. The chief inspector to cause a notice of such annual meeting to be fixed to the door of the place where the meeting is to be held, and to be advertised one calendar month before the holding of the meeting.

The 11th clause, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 21st, 22nd, 23rd, and 24th clauses relate to applications for licenses. They may be summarized as follows:—Every application for a license, wholesale or retail, must be by petition of the applicant to the board; the petition to be filed with the chief inspector. If the applicant is not a licensee under the Act or under any act of a Provincial Legislature, his petition must be accompanied by a certifi-

cate signed by one-third of the electors entitled to vote in the polling sub-division in which the premises sought to be licensed are situated. The name of each applicant is to be published in some newspaper in or near the district, also description of license applied for, and location of the premises. This is to be done at least fourteen days before the meeting of the board. If any ten or more electors object to the license being granted they may do so by petition setting forth either that (1) the applicant is of bad fame and character, or of drunken habits, or has previously forfeited a license, or has been convicted of selling liquor without license within three years; or that the premises are out of repair, or have not the accommodation required, or that the licensing is not required in the neighborhood, or that the premises are in the immediate vicinity of a place of public worship, hospital, or school, or that the quiet of the place would be disturbed if a license were granted. Such petition must be lodged with the chief inspector four clear days before the meeting of the board, and the application and objections are to be heard by the board—the hearing being open to the public. On every application for a license the inspector is to report in writing to the board, giving a description of the house, premises, and furniture, the manner in which the house has been previously conducted, the character of persons frequenting the house, the distance such house is from other licensed houses in the neighborhood, whether the applicant is a fit and proper person, whether the house is required for public convenience, and whether the applicant is or is not the true owner of the business of the hotel, saloon, or shop proposed for license.

The 25th, 26th, 27th, and 28th clauses relate to "accommodation." Every licensed hotel in cities and towns must contain not less than six bedrooms, and in other places not less than three bedrooms, and (except in cities and incorporated towns) proper stabling for at least six horses, besides those of the licensee. In all cases the hotel or saloon is forbidden to form part of or to communicate by any entrance with any shop or store where goods are kept for sale. Every hotel or saloon, before receiving a license, must be shown to be a well appointed eating-house for daily serving meals to travellers. The board may, however, dispense with the necessity of their having such eating-house accommodation, as to a certain number of saloons in any city or town.

Clauses 29 to 40 deal with the duties of the board. They are to hear and determine all applications and objections, and their announced decision is not to be questioned or reconsidered. They are not to grant a license if two-thirds of the electors of the sub-division petition against it; nor to give a license to any person declared to be disqualified, nor to any license commissioner or inspector. If in any district the board of that district do not see their way clear to

grant a new license for the ensuing twelve months, they may extend the time of the old license for three months. Upon the obtaining by the applicant of the certificate authorizing the issuing of a license the chief inspector is empowered to issue the certificate on payment to him of a fee of \$5 and the giving of the bond required, and upon the applicant establishing that he has paid or tendered the duty imposed by the Provincial Legislature.

41. The forty-first clause provides that before any hotel, saloon, or shop license is granted the applicant shall give a bond in \$500, with two sureties in the sum of \$150 each, conditioned for the payment of all fines and penalties.

42. The 42nd to 45th clauses provide for the number of licenses to be granted. The aggregate number of hotel and saloon licenses are (in general) subject to the following limitations:—In cities, towns, and incorporated villages, one for each full 250 of the first thousand of the population, and one for each 500 over one thousand, according to the last preceding census. Two hotel licenses may be granted in any town or incorporated village when the population is less than 500. In incorporated villages, being county towns, five licenses may be granted even if according to population such number would be greater than the above proportion. In places of summer resort the board may grant two additional hotel licenses for six months in each year. No saloon licenses are to be granted in townships or parishes.

The number of shop licenses in the respective municipalities are to be—one for each full 400 up to 1,200 of the population, and one for each full 1,000 beyond 1,200. Power is given to the council of any city, town, or village by by-law to reduce within any limit by the Act provided, the number of hotel, saloon, or shop licenses to be issued.

46. The 46th is the local option clause. It consists of eleven subsections. These provide that a majority of three-fifths of the electors in any town, incorporated village, parish, township, or other municipality (save counties and cities) may prevent any licenses being granted. The votes of the electors are to be taken by ballot in the manner provided by the Canada Temperance Act, 1878, and the several clauses thereof under the headings, "The Poll," "Scrutiny," "Penalties," "Preservation of the Peace," "General Provisions," "Prevention of Corrupt Practices," and "Penalties and Punishments Generally," are to be incorporated into the present Act. The poll is to be closed at five o'clock in the afternoon of the second day if the votes of all the electors present at five o'clock on the first day were not polled. Such prohibition of sale will last until repealed by a vote of the electors, provision for the taking of which is made by the Act. Every license is held to be a license only to the person therein named, and for the

premises therein described, subject to the provisions of the Act as to removals and the transfer of licenses.

The 48th to 54th clauses deal with transfers and removals. It is provided that where a licensee dies, or sells, or assigns, or removes, the license is *ipso facto* forfeited unless such person, his assigns or legal representatives, within one month after the death, assignment, or removal of, or sale by, the original holder obtain the board's written consent either for the continuance or the transfer of such license to some other person. In case of the marriage of any female licensee, her husband has conferred upon him the privileges and responsibilities of such license on confirmation by the chairman of the board.

A chief inspector, on permission by the board, may allow the holder of a license to remove from one house to another equally well supplied with accommodation, provided the application is accompanied by a certificate signed by a majority of the electors of the polling sub-division to which it is proposed to remove.

55th to 56th clauses deal with the license fund, which is to be applied to the payment of salaries and expenses, the residue going to the treasurer of the municipality in which the licensee is situated, for the public uses of the municipality.

57th clause provides for the revocation of licenses improperly obtained.

58th clause provides for the issuance of permits to sell in municipalities where no license is granted. The certificate of a resident physician to a patient under his immediate care, or of a clergyman to a person whose spiritual adviser he is, is required (under a penalty of \$30 for contravention of this provision) before the person permitted to sell can do so; and then he cannot sell more than one pint, which must not, under a penalty of \$40, be allowed to be drunk on the premises. The person so permitted to sell has to make a monthly sworn report showing to whom sold, what quantity, and upon whose certificate, under a penalty for neglect of \$20.

59th and 60th clauses deal with the registry of licenses. The register must contain the particulars of all licenses granted in each district, all forfeitures, disqualifications, convictions. The board must report annually to the Minister of Inland Revenue.

61st to 77th clauses deal with regulations and prohibitions. The principal of these are that the licenses must be conspicuously exposed, under a penalty of \$5: that the words, "Licensed to sell spirituous or fermented liquors," are to be exhibited in large letters over the door; that every hotel-keeper, being a licensee, shall keep a lamp over the door, lighted every night; that only one bar shall be kept in any licensed premises; that no

liquors are to be sold in any licensed place from seven o'clock on Saturday night till six o'clock on Monday morning; nor from 11 p.m. until 6 a.m. every other night, provided always, that in hotels liquor may be sold on Sundays to the guests, *bona fide*, residing or boarding in such houses, during meals between one and three p.m., and five and seven p.m., to be drunk or used at meals at the table.

Stringent regulations are provided against sale of liquors on election day; against receiving pledges or pawns in payment or payment in advance; against permitting drunkenness or disorderly conduct, or suffering drunken persons to consume intoxicants on the premises. And power is given any licensee to refuse admission to any person intoxicated; against the sale of intoxicants to minors under the age of 16 years; against the sale of liquors in any store or place where groceries or other merchandise are sold, provided that this shall not apply to any licensee in towns and cities having a license at the time of the passing of the Act, prior to 1st May, 1890, and elsewhere prior to 1st May, 1887; against treating by a licensee; against vessels selling liquor while moored or at a wharf.

78th and 79th clauses deal with adulteration and penalties therefor.

80th and 81st clauses define the powers of inspectors.

The remaining clauses deal with penalties, prosecutions, procedure, appeals, evidence, witnesses, and with municipalities under the Canada Temperance Act, 1878. The penalties inflicted for offences against the 65th clause, for first offence, \$20 with costs; second offence, \$50 with costs, and in default of payment in case of first conviction 15 days' imprisonment with hard labour, and in case of second conviction one month's imprisonment with hard labour.

Licensees may be interdicted from selling liquor to any drunkard, notice to be given by the chief inspector on demand of a husband or wife or other interested person, the penalty for disobedience being suspension of license for six months for first offence, and liability to forfeiture for second.

If a person falsely represents himself to be a lodger in order to obtain liquor at any premises during the period such premises are required to be closed as to the sale of liquors, he makes himself liable to a penalty not to exceed \$20.

On the trial of any information or complaint against the provisions of this Act the person charged, or husband of such person, is a competent and compellable witness, until the 1st of May, 1884. All the laws of Provincial Legislatures of the Dominion passed for regulating or restraining the traffic in liquors are by section 143 of the Act made as valid and effective to all intents and purposes as if enacted by the Parliament of Canada.

The Legal News.

Vol. VI. JUNE 30, 1883. No. 26.

CRIMINAL STATISTICS.

The appendix to the Report of the Minister of Agriculture, which has just been issued, contains the criminal statistics of the Dominion for the year 1881. The total convictions during this period numbered 29,225; 4,353 being for offences against the person, 144 for offences against property with violence, 2,094 for offences against property without violence, 499 for malicious offences against property, 35 for forgery and offences against the currency, and 22,100 for offences not included in the above classes, such as drunkenness, contravention of municipal by-laws, &c.

The Province of Quebec exhibits the superiority noticed last year (5 L. N. 132). A comparison with Ontario gives the following result:—

CONVICTIONS:

	Ontario.	Quebec.
Offences against the person...	2,914	762
Offences against property, with violence.....	81	45
Offences against property without violence.....	1,150	631
Malicious offences against property.....	340	94
Forgery and offences against the currency.....	22	10
Other offences not included in the above classes.....	12,603	4,888
	17,110	6,430

THE BELT CASE.

A remarkable instance of disagreement between Court and counsel as to the conduct of a cause occurred in England lately, during the hearing of the rule in the *Belt* matter. "A surprise," says the *Law Times*, "befell the counsel in the *Belt* case on Tuesday. Sir Hardinge Giffard appears to have assumed, that like meek beasts of burden, the Lord Chief Justice of England and his colleagues would patiently bear the yoke which he imposed upon them, and slumber though the summing-up of Baron Huddleston—the task of reading which was left to the junior counsel. Very early on Tuesday the patience of the court was exhausted, and

Lord Coleridge, in terms none too strong, represented the course adopted of leaving a cause 'supposed to convulse society' to the chapter of accidents. He suddenly called upon the plaintiff's counsel to deal with the grounds of the rule. The leader being still absent, the leading junior was required to argue, and the lively time he had of it will be seen from the newspaper report." The reported observations of the Lord Chief Justice were to this effect: "My learned brethren and myself, seeing the endless length to which this case is likely to run, are desirous of avoiding what seems very much like a public scandal. The reading of the summing-up now seems to have reached a point at which in my judgment it might properly terminate. Sir Hardinge Giffard told us on the first day, with an air of authority, that it was absolutely necessary to read the whole of the evidence, but on the second day he gave way to our remonstrances. Then in the same short peremptory way he told us that it was absolutely necessary that the whole of the summing-up should be read. That has now occupied the better part of three days, and there is much more yet to be read. Well, it is not doing us any good—this reading of the summing-up without any comment. In the absence of the leader, when any question is put to the junior counsel, they very properly say that they cannot take the responsibility of answering it. Speaking for myself, and I believe for my learned brethren, this reading has become a rather serious waste of time."

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, June 28, 1883.

Before TORRANCE, J.

GEOFFRION V. SÉNÉCAL.

Alternative obligation—Default—C. C. 1069.

The defendant undertook to return a certain number of shares in a railway before a day stated, or to pay an amount in money. The shares were not returned. Held, that the contract being of a commercial nature, the debtor was put in default by the lapse of the time of performance.

The demand was to recover \$3,400. On the 7th March, 1882, the defendant acknowledged

to have received from Mr. J. O. Turgeon, advocate, 450 shares in the capital stock of the Laurentides Railway, making \$4,500. Mr. Sénécal undertook to return an equal number of shares to Mr. Turgeon between then and Monday next, or to pay him \$4,500 in money. The shares were not returned. Mr. Turgeon transferred his claim to the National Bank, and the Bank transferred its claim to the plaintiff.

The defendant pleaded that the shares in question had no value; that he had had no value for the writing he had signed, and that Turgeon had given no value for them, and defendant offered to return them.

F. X. Archambault, for defendant, cited C. C. 1067, 8, 9, and said that there had been no default as yet.

PER CURIAM. This is a mercantile matter regulated by C. C. 1069: "In all contracts of a commercial nature in which the time of performance is fixed, the debtor is put in default by the mere lapses of such time." As I read the agreement, the defendant was bound, so soon as Monday, 11th March, 1882, was past, to pay the amount in money. The plaintiff, therefore, is entitled to judgment.

Judgment for the plaintiff.

Geoffrion & Co., for plaintiff.

Archambault & David, for defendant.

SUPERIOR COURT.

MONTREAL, April 30, 1883.

Before TORRANCE, J.

CATELLI v. COWPER.

Contract—Sale of business and good will—Manufacture of similar article.

The defendant sold his business as a flock manufacturer, including the good will, and undertook not to deal or be interested in wool flock for five years. He continued to manufacture an article called wool batts, or carded shoddy, closely resembling flock. Held, a breach of contract.

This was an action for breach of contract.

The defendant, by deed of sale of date 11th March, 1882, being then a flock manufacturer, sold with promise of warranty to plaintiff certain moveables in the factory of defendant, No. 584 William street, together with the good will of the business of wool flock manufacturing, which defendant had carried on for some time. The consideration was \$4,000. It was well un-

derstood between the parties that the defendant should not, on any account, for the space of five years from date of deed, enter into the manufacture of or sale or business, or in any manner deal or be interested in wool flock, to the detriment and injury of said Pierre Catelli.

The complaint was that since the said date the defendant had continued to manufacture flock, to the damage of plaintiff.

The pretension of the defendant was that he had neither sold nor manufactured flock. 1st. The article manufactured by defendant was obtained by a process different from that producing flock. 2nd. The article produced by defendant was composed of different elements. 3rd. It was not called flock. 4th. It was much more costly than flock. 5th. It served an entirely different purpose from flock.

PER CURIAM. The defendant admits that flock and wool batts or carded shoddy, are two articles resembling each other a great deal, and that in passing them from hand to hand it is difficult to distinguish them. The Court is satisfied that the article produced by defendant comes from the article produced by the plaintiff, and that the defendant cannot produce his article, call it wool batts or what you please, without producing the article made by plaintiff, the business of which and the good will of which was sold by defendant for a sum of \$4,000. The Court, therefore, thinks that the action by plaintiff is well founded.

There remains to settle the *quantum* of damages. The witness, François J. Langlois, says the manufacture by defendant was after the month of August. The action began on the 11th September, which would give ten days of damages, at the date of the action. The Court fixes the damages at \$200, and grants the other conclusions of the declaration.

Judgment for the plaintiff.

Duhamel & Rainville, for plaintiff.

Geoffrion & Co., for defendant.

SUPERIOR COURT.

MONTREAL, June 26, 1883.

Before TASCHEREAU, J.

LIGHTHALL v. CAFFREY.

Broker's Commission.

Where a broker or agent has negotiated a sale of property between his principal and a purchaser whom he has procured, and an agreement for carrying out the transaction is entered into between the parties, he is entitled to his commission, notwithstanding that the agreement may fall through by reason of bad faith in one or other of the parties to the contract.

The action was for \$5,025, being \$5,000 commission for the negotiation of a sale of property, and \$25 for drawing the deeds, etc.

The declaration set up that within the twelve months preceding the 21st September, 1878, the plaintiff was employed by the defendant, living in Nova Scotia, through the instrumentality of one Constant, also residing there, to dispose of a certain mining property belonging to the defendant, in Nova Scotia, and known as the Jennings gold mine. The price of the mine, at the time the plaintiff was first employed to dispose of it, was \$12,000.

Afterwards, by the plaintiff's advice, it was raised to \$16,000, of which \$5,000 was to be commission. This was during the summer of 1878. In the beginning of September of that year the plaintiff heard through one Hawkes, that John A. Cameron, of Fairfield, in the county of Glengarry, wished to dispose of his property there, a homestead, valued at \$45,000. Cameron being a dealer in mining property, negotiations were opened with him, which resulted in a visit, on the 3rd of September, of Caffrey and some of his family to the property of Cameron, at Fairfield. Both defendant and the members of his family with him expressed themselves as delighted with the property and most anxious to effect a transfer. The parties having returned to Montreal, a basis of agreement was arrived at, drawn up and signed by the parties in plaintiff's office, and defendant expressing himself perfectly satisfied with the arrangement, gave the plaintiff a written acknowledgment in the following terms:—

"Montreal, 15th Sept., 1878.

"Having to-day made arrangements to sell the mines to the said J. A. Cameron for \$20,000, upon the deeds being completed, I am to settle with you for \$5,000, as your commission, the \$1,000 to be arranged with Mr. Constant out of that sum."

Other visits and interviews took place, and on the 21st September an amended agreement was entered into, in plaintiff's office, containing some slight differences of arrangement, the terms being \$45,000 for the Cameron property, to be made up as follows:—The Jennings gold mine at a valuation of \$20,000, a mortgage on the Cameron property of \$14,000, to be assumed by defendant, and for the balance of \$11,000 Cameron was to take defendant's homestead property at Truro at such price as should be agreed upon, or defendant to raise the cash by mortgage of his property there. Defendant also at the time of signing this latter

agreement gave to Cameron a transfer of title to the mine property which the latter immediately sent to Nova Scotia and caused to be registered. Defendant then returned to Nova Scotia, and on the 28th September wrote to plaintiff withdrawing from and repudiating the entire transaction.

The plea was that the deeds had never been completed; that there were undisclosed mortgages, and Cameron never was in a position to give a good and valid title; that pending the negotiations Cameron lost the ownership of the property, and the plaintiff knew of this when he handed the deed to Cameron; that the animals also had been disposed of at judicial sale and otherwise, and that the undertaking of defendant to pay plaintiff \$5,000 being conditional on the completion of the deeds, and the deeds never having been completed by the carrying out of the transaction, plaintiff could claim nothing for his services, and the action should be dismissed.

Counsel for plaintiff cited 1472 and 1722 C.C.; Evans, Principal and Agent, 340; *Love & Miller*, 21 Am. Rep., 192; *Chapin & Bridges*, 116 Mass. 105; *Cooke & Fiske*, 12 Gray, 491; *Drury & Newman*, 99 Mass. 258; *Knapp & Wallace*, 41 N.Y. 477; *Rice & Mayo*, 107 Mass. 150; *Higgins & Moore*, 34 N.Y. 417; *Richards & Jackson*, 1 Am. Dig. 24, 400; *Fortin & Dupras*, Jetté, J., Sup. Ct., and *Geddes & MacNider*, Rainville, J., do.

The Court held that there was no proof that Cameron was not in a position to deliver his property as agreed upon, or of any of the things complained of, and even if there were, that according to the well established jurisprudence of this country, and according to the article of the code 1722 above cited, the commission of the plaintiff was earned when the parties whom he had brought together entered into the agreement, and the amount was fixed by the acknowledgment of the defendant himself.

Judgment for plaintiff.

Stephens & Lighthall, for plaintiff.

E. Barnard, Q.C., Counsel.

Edward Carter, Q.C., for defendant.

SUPERIOR COURT.

MONTREAL, April 30, 1883.

Before TORRANCE, J.

BOURDON et al. v. TRUDEL.

Sale—Credit given to another.

The action was to recover the amount of an account for \$123. The defendant answered

that he only owed \$50.95 for items from 20th December, 1877. The evidence showed that the previous items had been charged by plaintiffs to one Blois, with whom they had an account, and in whose employ Trudel was. In December, 1877, Blois went into insolvency, and from that time Trudel undertook to pay himself.

PER CURIAM. The question is to whom credit had been given, and the answer should be—to Blois and not to Trudel. The plea of Trudel should be maintained, and the action dismissed for the surplus over \$50.95.

Prefontaine & Major, for plaintiffs.
A. Brunel, for defendant.

SUPERIOR COURT.

MONTREAL, April 30, 1883.

Before TORRANCE, J.

ROUSSEAU et al. v. EVANS.

Sale—Condition—Parole evidence.

Where goods have been purchased and paid for in advance of delivery, parole evidence is inadmissible to establish that the defendant was only bound to deliver in the event of the goods arriving, there being no mention of such condition in the bill of sale and receipt.

This was an action of damages for non delivery of four cases of phosphorus sold by defendant to plaintiffs, on the 10th November, 1882. The price, \$232, was paid on the 11th November. The defendant pleaded that the sale was conditional upon the arrival of the phosphorus in Montreal, and it did not arrive. The plaintiffs proved a rise in value of \$60, and the defendant proved by witnesses the allegations of his plea.

PER CURIAM. The sale is proved by witnesses and the bill of sale receipted by the defendant. The bill says nothing of the condition attached by defendant to the sale, that it should only be binding if the phosphorus arrived, and the question is submitted by plaintiffs that the evidence by witnesses of defendant that the sale was only conditional, should be ruled out and rejected as inadmissible, as contradicting a written agreement. The Court is with the plaintiffs, and holding this view, the plaintiffs should have judgment for these damages and costs of protest. (*Greenleaf*, vol. 2, § 275).

Archambault, for plaintiffs.

T. C. Butler, for defendant.

COURT OF QUEEN'S BENCH.

MONTREAL, January 20, 1883.

DORION, C. J., MONE, RAMSAY, CROSS, BABY, JJ.
WILLETT (defendant below), Appellant, and
COURT es qual. (plaintiff below), Respondent.

Endorser—Accommodation—Evidence.

The defendant, endorser, being sued on a promissory note, pleaded that he had endorsed for credit, and that the plaintiff (a subsequent endorser) had guaranteed the prior endorsers that he would see the note paid. Held, not proved, it appearing, among other things, that the defendant had by a letter to plaintiff personally guaranteed due payment of the note in question.

The appeal was from a judgment maintaining the respondent's action.

RAMSAY, J. This is an action on a promissory note for \$10,000, brought by the last endorser against a prior endorser.

The defence to the action is that the drawer, a railway company, was in difficulties; that advances had been obtained in England by the contractors; that these advances were insufficient, and that the whole enterprise was likely to fail unless more money could be obtained. That, therefore, the English creditors had sent out the original plaintiff, Clark, to arrange some mode of carrying on the railway, and that he, in order to obtain money, got the directors to make the note in question in the name of the company, promising that the persons he represented in England would pay the note at its maturity. In other words, that he guaranteed them that he, Clark, would see the note paid, and that their endorsements were merely a matter of form and for credit.

This story is possible, and perhaps, it may be said, it is not entirely devoid of probability; but, at any rate, it is a defence which throws the burthen of proof on the defendant. He attempted to make the necessary proof by the testimony of persons interested like himself in escaping responsibility. They swear with considerable precision that they never expected to be called on to pay the note; that their interest was small, while the interest of the English creditors was great, and that they signed only for credit. This establishes nothing really incompatible with the liability of Willett to Clark, and unfortunately there are several pieces of evidence which go far to de-

stroy the conclusion they desire to be drawn from this testimony. In the first place, there is the evidence of the manager of the bank where the note was discounted, who tells us positively, that when the note was first offered him Clark's name was not on it, that he positively refused Clark and the defendant to give the money without Clark's endorsement, that Clark left, refusing to sign, having no interest and no authority to endorse from his friends in England. The next day, however, he returned and signed, and thereupon the manager gave the money. If this story be true, it was Clark who signed for credit after all the others. In the next place, it is proved beyond a doubt that the defendant as President of the road got the money, and he wrote as a receipt to be handed to Clark a letter, which seems to indicate that then, at all events, the defendant and the other directors endorsers looked upon their having to pay the note as a not improbable contingency. The letter is in these terms:—

MONTREAL, 7th August, 1874.

James P. Clark, Esq. :

DEAR SIR,—I hereby acknowledge receipt of your cheque for \$9,800.55 to my order, being discount of the note of the Montreal, Chamby and Sorel Railway, by myself, as President, and by the Secretary, to the order of Ashley Hibbard, contractor, and endorsed by *self, personally guaranteeing the due payment of the same*, as also by fellow Directors. And I hereby bind and oblige myself to see personally that the proceeds hereof are applied to the purposes for which the note was granted by the Board, per their resolution, namely, the payment of wages, &c., now past due, and for no other purpose whatsoever; and,

I am, dear sir,

Very faithfully yours,

(Signed), S. T. WILLETT.

But it is urged that the object of that letter was to assure Clark that the money would be expended in furthering the common enterprise. To some extent this is true. It was unnecessary to create a legal liability on the note; but incidentally it shows that Willett had not at that time present to his mind the idea which he puts forth now in his defence; or, if he had, it is unfortunate for him that he should have used expressions incompatible with his present

exception. This becomes more striking if we take a third fact perfectly proved, which seems to increase the improbability of the defence, and it is this, that one of the directors, Baker, said he would not endorse, but he would give his share in money, which he did. It is not very likely he would have done this if he had thought he was to have Clark and all his friends in England between him and payment.

A point is made by appellant of the fact that Clark borrowed part of the money to retire the note from two of Baylis' creditors. Even if it were admitted that they gave him the money to withdraw the note it would not strengthen the defence a whit. It would show that Clark was compromised through his efforts in their favor, and that therefore they protected him. But as a fact Clark swears in answer to interrogatories from which alone we know the fact, that he borrowed the money from them. I go further and say that if Clark had been the agent of Crossley authorized to endorse this note, it would not change the matter, and really this is all Hibbard's evidence goes to establish when he says "Mr. Crossley told Mr. Rae in my presence that although Mr. Clark had endorsed it, it was endorsed for him and his associates, friends, and practically it was his to pay." This is no more than to say: "My friends and I will protect Clark, although he is legally responsible, having endorsed, and practically, that is so far as the Merchants' Bank is concerned, we will have to pay instead of him." There was also a point made of Rae writing to the English parties for payment. This is no contradiction to his testimony. He hoped these friends would protect Clark who was liable to the bank, it does not show that he ever expected they would protect Willett.

Judgment confirmed.

Kerr & Carter for appellant.

Hutton & Nicolls for respondent.

THE BRADLAUGH PROSECUTION.

The case of *Reg. v. Bradlaugh*, for the publication of a blasphemous libel in the *Freethinker*, absolutely bristled with points of law. The Bankers' Books Evidence Act, 1879, the Evidence Further Amendment Act, 1869, and Lord Campbell's Act, and the law of blasphemous libel, all came under discussion in the course of the case, or of the Lord Chief Justice's sum-

ming-up. As to the first, Lord Coleridge seemed to have been under some misapprehension. The act complained of by Mr. Bradlaugh on the part of the prosecution in obtaining an order from the Lord Mayor for the inspection of his banker's books was not taken under the 6th section of the Act of 1869, but under the 7th. The order was not made to compel the banker to produce the books in court, which can only be done by a judge, but to allow the other side to inspect and take copies of any entry therein. The wording of the section allows "a court or judge to order" such inspection "on the application of any party to a legal proceeding." Court is defined to be the "court, judge, arbitrator, persons or person before whom any legal proceeding is held or taken," and "legal proceeding means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitrator." In correction of our remark last week, we say, therefore, that it obviously includes the Lord Mayor, sitting as a magistrate, and even the petty sessions' magistrates, against whose power to order an inspection of his banker's book the Chief Justice expressed so much horror.

The Evidence Further Amendment Act, 1869, sec. 4, was brought under notice by one of the witnesses for the defence, claiming to affirm on the strength of his statement that he was an atheist. Mr. Bradlaugh said that it had been so decided, but the decision was not reported. The Chief Justice refused to allow him to affirm until he had stated that he was "a person on whose conscience an oath had no binding effect"; but upon the witness saying that "the oath had no binding effect on his conscience *per se* as an invocation," he permitted him to make the "solemn promise and declaration" prescribed by the Act. It is probable that the mere assertion of entertaining atheistic opinions is sufficient to enable a witness to affirm under the Act instead of taking an oath, as the words are more general than those used in the previous Act of 1861, under which the witness had to assert as part of his affirmation that "the taking of any oath, according to his religious belief, was unlawful." Under the present Act he has only to "object to take an oath, or be objected to as incompetent to take an oath." But an atheist is incompetent to take an oath, because, as Lord

Chief Justice Willes said, in *Omicund v. Barker*. "such infidels, if any such there be, who do not believe in a God . . . cannot be witnesses in any case or under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation upon them"; and, therefore, if he objects to take an oath, the judge ought upon that statement to be satisfied that an oath is not binding upon his conscience, and to admit him to promise under the Act. Lord Coleridge, in his summing up to the jury, maintained the statement of the law of blasphemous libel as laid down in *Starkie*, and stated by his father, Mr. Justice Coleridge, against that contended for by Mr. Justice Stephen in his *History of the Criminal Law*, viz., that it was the manner in which an attack on Christianity was made and not the matter, which made it libellous. The reasons adduced for this opinion, however, are hardly of much weight. The consequences of holding the reverse view, that to attack Christianity, however respectfully, was criminal, founded as it was on the doctrine that Christianity was part of the Constitution, would be that any political attacks on, say hereditary monarchy, or the law of primogeniture, would be criminal also. But the judges who laid down that attacks on Christianity were blasphemous libels, did hold that attacks on the monarchy were seditious libels. Because the consequences of the law being what it is said to be by Mr. Justice Stephen would be monstrous, that did not prove that the law is not so; it only proves that there is every reason why it should be changed. The Chief Justice's ruling may be upheld more surely on the ground that the law has been so stated for the last thirty years, and that it is expedient that the modern should overrule the ancient authorities, than on the mere inference that because the logical result of the ancient ruling would be absurd, therefore it is not the law. However, the case did not turn upon the issue of blasphemy or no blasphemy, but on that of publication of the alleged libel by the defendant. On this point the Lord Chief Justice in his summing up dealt exhaustively with the subject of the criminal liability of the proprietor or editor of a paper for the publication of a libel. This involves the construction of the 7th section of Lord Campbell's Act, 6 & 7 Vict. c. 96. The section runs "that

whenever upon the trial of any indictment or information for the publication of a libel, evidence shall be given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent or knowledge." The much discussed case of *Reg. v. Holbrook*, 37 L. T. Rep. N. S. 530, decided that in a trial for a defamatory libel evidence that the defendant, although proprietor, or having the general control over a newspaper, had entrusted the sole charge of it to an editor, and had not authorized and had no knowledge of the particular libel incriminated, was within the section and afforded a complete answer to the charge. Lord Coleridge held that the section applied equally to an indictment for blasphemous libel, the words of the section being, unlike those of the other sections of the Act, not confined to defamatory libels, but perfectly general in its terms. The evidence against Mr. Bradlaugh consisted in his having, under the name of the Freethought Publishing Company, formerly been the publisher of the paper in which the libels appeared, and in the paper being sold in a shop of which he was proprietor. But, according to Mr. Justice Lush in *Reg. v. Holbrook*, "a proprietor whose agent sells over the counter libels without his knowledge would not be criminally liable if able to show that the sale was without his authority." As Lord Coleridge left the question to the jury, it was not "whether Mr. Bradlaugh had anything to do with the paper, but whether he had authorized the sale of the articles complained of; it was not enough that he might have stopped them, the question was whether he had authorized their sale or publication." The ruling adopted by the Lord Chief Justice may now, therefore, be taken to be settled law, that in an indictment for any kind of libel which appears in a newspaper, the question is not whether the defendant authorized the publication of the paper, but whether he authorized the publication of the libel.—*London Law Times*.

UNDUE INFLUENCE.

In the case of *Hides v. Hides*, 65 How. Pr. Rep. 17, there is enough of the curious and the funny to entitle it to particular mention in the

humorous phases of the law. This was an action to set aside a marriage and a conveyance of property to the wife on the ground of fraud. The man was old, feeble, deaf, childish, and a fervent believer in spiritualism. The woman pretended to be "very modest and bashful," and a clairvoyant physician able to cure the old man's deafness. So she "manipulated his head, put her fingers into his ears," and held his jaw. After a course of this treatment, she told the old man that the spirits said they must be married within two weeks or something dreadful would "step in between them." She also told him she was from one of the first families of Ireland (it does not appear that she claimed descent from an Irish king), that "her character was as pure as the white snow," and that her relations abroad were very rich. The long and short of it is that by means of these representations—all false—she prevailed on the old man to marry her and deed to her property worth \$25,000, including a mineral spring which the spirits had discovered to him. The old man came to his senses after the honeymoon, and prayed to be released on the ground of fraud. The referee granted his prayer, putting his decision solely on the ground of undue influence by means of the spiritual delusion, which he pronounced an "atrocious fraud." The court at special term, Landon, J., confirmed this judgment, observing: "That he was predisposed by the faith of many years to a readiness of belief in the truth of such representations made him, it is true, the more easily a dupe and a victim, but it does not make the grossness of the deception less nor accord to the impostor any protection. . . . Our law prescribes no religion, but tolerates all and condemns none, and therefore the plaintiff's case suffers no detriment because his religious belief exposed him to the arts of the defendant." So it seems if we were called on to construct a syllabus for this case we should have to do it as follows: In an action to set aside a marriage for fraud, practised by means of the plaintiff's belief in spiritualism, the doctrine of contributory negligence does not apply, any more than in an action of seduction.—*Albany Law Journal*.

RECENT ENGLISH DECISIONS.

Carrier.—Where rags, which were packed damp, shipped by a carrier, were injured in

consequence of a dereliction of duty on the part of such carrier, but it was conceded that they would have sustained no injury if they had been packed dry, and shown that the carrier was not informed that special care was necessary, held, that the carrier was liable only to nominal damages.—*Baldwin v. London Ch. & Dov. R. Co.*, L. R., 9 Q. B. D. 582.

Contempt.—1. Publishing and circulating copies of the pleadings in a pending action, with comments deprecating the case of one of the parties, is a contempt of court, which, if threatened, may be restrained by injunction.—*Kilcat v. Sharp*, (Eng. Ch. D.) 48 L. T. Rep. (N.S.) 64.

2. Such a publication sent to one not friendly to the sender is not privileged, though marked "private."—*Ib.*

GENERAL NOTES.

The following have been named commissioners to consolidate and revise the Statutes of Canada:—Hon. Sir A. Campbell, Minister of Justice; James Cockburn, Q.C.; J. A. Ouimet, W. Graham, Q.C.; G. W. Burbidge, Deputy Minister of Justice, A. Ferguson, and W. Wilson, Assistant Law Clerk.

According to a California paper, Chinamen who deal in unstamped cigars have dropped on a new dodge. They paste pieces of red pepper on some fish scales on their faces, and when brought before the court, begin to scratch off the scales. Then somebody cries, "A leper," and the Judge holds up his hands in horror, saying: "The defendant is not guilty: get out of here, John, as quick as you can."

DURATION OF PARLIAMENTS.—The Parliament of Canada met this year on the 8th of February, and was prorogued on the 25th day of May, it having been the longest session on record since Confederation. The following statement may be of interest:—

Parliament of 1869 met	15 April	and rose	22 June.
"	1870 "	16 Feb.	" 12 May
"	1871 "	17 Feb.	" 14 April
"	1872 "	11 April	" 14 June
"	1873 (1st)	5 March	" 13 Aug.
"	1873 (2d)	23 Oct.	" 7 Nov.
"	1874 met	20 March	" 26 May
"	1875 "	4 Feb.	" 12 April
"	1876 "	10 Feb.	" 12 April
"	1877 "	8 Feb.	" 28 April
"	1878 "	7 Feb.	" 10 May
"	1879 "	13 Feb.	" 15 May
"	1880 "	12 Feb.	" 7 May
"	1881 "	9 Dec.	" 21 May
"	1882 "	9 Feb.	" 17 May
"	1883 "	8 Feb.	" 25 May

The first session of the second Parliament (1873) was adjourned, it will be remembered, in consequence of the Canada Pacific inquiry, and did not sit all the time indicated.

A lawyer of the Trojan bar,
Modest and meek as lawyers are,
Though quite decided that he knew,
For general use, a thing or two
Which must some day bring to his net
The larger fish that dodged him yet,
Sat nodding in his office chair—
(In truth he had much time to spare)
When just as his glad dream had centered
On a large fee, a client entered.
Th' unwonted footstep, creaking, broke
Along the floor—the lawyer woke,
Thrust out his hand as if to seize
(Fruits of his dream) the expectant fees;
But finding no retainer in it,
Stared at the stranger for a minute,
Then motioned to a seat, and muttered
Something about his bread unbattered,
And then proceeded to explain
That lately such excessive strain
His mind had undergone while he
Was bending all his energy
On an important case, involving
Such intricate points for legal solving
That he believed, in point of fact,
His brain was hardly left intact;
And that revenging nature cast
His weary eyelids down at last.
But he was ready now, he thought,
To give such counsel as was sought.
The countryman—for such he seemed
Looked dazed as if he, too, had dreamed;
For not a word of all was stated
His dull, crude sense had penetrated.
"Wal, Squire, I've come—if you're awake—
To see what course I orter take
With Bill O'Neil who's run away
And owes me for a ton of hay.
The biggest rogue I ever saw:—
Now tell me, lawyer, what's the law?"
"Why, sir, the case requires some thought:
The fellow then, it seems, has bought
Your personal property."—"No! my *hay*!"
"Absconded and refused to pay."
"No! no! Squire, no!—Did I not say,
The dirty dog has run away?"
Precisely, but my Blackstone says
Absconded is a legal phrase.
Now let me see:—You must get out—" "
"Oh, I will go, Squire, never doubt—" "
"A short attachment; seize upon
His household goods—your suit is won!"
"His household goods?—why what a dunce!
His household goods—I told you once
That he's got nothin' anywhere,
No more than *you*!—Oh, you may swear.
I'll find some sharp, shrewd lawyer, yet
Who'll tell me how to get my debt!"
Out rushed the hind with visage grim,
The legal boot assisting him.
The lawyer cheated of his fee
Stalked out more grimly e'en than he;
But first he tacked upon his door
A card that read:—"Return at 4."

—F. J. Farmer in *Troy Press*.

The Legal News.

VOL. VI. JULY 7, 1883. No. 27.

FEDERAL AND LOCAL JURISDICTION.

Two cases are noted in the present issue, bearing upon the respective powers of the Provinces and the Parliament of Canada. In the case of *Poulin & Corporation of Quebec*, the Court of Queen's Bench of the Province of Quebec affirmed a decision of Chief Justice Meredith, holding that a local Act, regulating the times at which saloons and taverns should be open for the sale of intoxicating liquors, is within the powers of a local legislature, being a mere matter of municipal police regulation, and that such legislation is not an interference with the Dominion power to regulate trade and commerce. The appeal taken from that judgment has now been dismissed by the Supreme Court. There can be little difficulty as to the soundness of this decision, and even those who have advocated the contrary opinion must, we think, be convinced by the reasons which have been given for refusing concurrence with their views. In the same sense is the decision given by Mr. Justice Tarrance in *Pillow & City of Montreal*, also noted in our present issue. It was said that the local legislature, in authorizing the passing of a by-law against chimneys casting forth their smoke into the common air, had dealt with nuisance—a matter of criminal law—and, therefore, had exceeded its powers. The learned Judge before whom the point came in the Superior Court overruled this pretension. The decision seems to be fully justified by the judgment of the Supreme Court in *Poulin & Corporation of Quebec*, and it conforms to the principles which have governed several decisions of the same class.

THE STAMP QUESTION.

In *Coughlin v. Clark*, noticed on page 169, in which an appeal was taken from the judgment of Wilson, C.J., on the ground that the promissory note sued on was not properly stamped before the repeal of the Stamp Act, and that double stamping after the repeal did not cure the defect, judgment was rendered by the Queen's Bench Division, at Toronto, June 30, dismissing the appeal.

THE MARRIAGE BILL.

The cry of clerical influence, with which we have become so familiar in this Province, reaches us in a new form from England, in connection with the bill legalizing marriage with a deceased wife's sister. The second reading was carried this year in the Lords, after a struggle of many years, by a vote of 165 for and 158 contra. It was remarked that twenty bishops voted against the bill, and not one for it. But, at a later stage, the bill was defeated, and now it is said that the bishops not only recorded their own votes against the measure, but used private influence with lay peers who favoured the bill, to induce them to abstain from voting. So the cry is raised, turn the bishops out of the House of Lords. We imagine that, if the bishops have sufficient "private influence" to defeat the bill, they were perfectly justified in using it. Their influence is the influence of men of culture and intelligence, and the Upper House would decidedly be the loser by their expulsion. A measure which they agree to oppose can afford to stand over, and so the Marriage Bill can well afford to await the event of another session or two.

SUPREME COURT DECISIONS.

The judgment of the Court of Queen's Bench, Montreal, has been reversed by the Supreme Court in the following cases:—*Loranger & Reed*, 5 L. N. 363; *Lionais & La Banque Molson*, 5 L. N. 364. The judgment in *Grange & McLellan*, 6 L. N. 138, has also been reversed. In the case of *Loranger & Reed*, in which the question is as to the constitutionality of the Provincial Act imposing a stamp duty of ten cents on exhibits, Justices Taschereau and Strong dissented.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, July 5, 1883.

Before TORRANCE, J.

Ex parte *Pillow et al.*, Petitioners for Writ of *Certiorari*, and *THE CITY OF MONTREAL*, Respondent.

Local and federal jurisdiction—Municipal institutions—Nuisance.

The power of the Dominion Parliament to enact a general law of nuisance as incident to its right to legislate as to public wrongs, is not incompatible with a right in the Provincial Legislatures to authorize a municipal corporation to pass a by-law against nuisances hurtful to public health, as incidental to municipal institutions.

This was the merits of a motion to quash a conviction made on the 29th November last.

The petitioners were occupants of a manufactory of cut nails, and it was complained that the chimney sent forth smoke in such quantity as to be a nuisance hurtful to public health and safety, and that they refused to remove and abate the nuisance, contrary to the by-law of the City of Montreal No. 130.

The defendants pleaded that the city had no jurisdiction to enact the By-law, and did not enact it in virtue of any competent legislative authority. The defendants were convicted.

PER CURIAM. The main question as put by the petitioners is,—Had the Legislature of Quebec power to authorize the city of Montreal to pass the by-law? Such power, if it exists, must be derived from the sections 91 and 92 of the Confederation Act, 1867. Sec. 91 enacts that the exclusive legislative authority of the Parliament of Canada extends to the criminal law. And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces. Section 92 says that in each province the legislature may exclusively make laws in relation to municipal institutions in the province.

The petitioner contends that among the subjects assigned exclusively to the Parliament of Canada is the criminal law, and that the subject matter of the by-law—a nuisance—is a matter of criminal law,—referring to the text-books on the subject. The city, on the other hand, contends that though the Federal Parliament has jurisdiction over nuisances in general, it does not follow that the local legislatures cannot prohibit insalubrious or dangerous establishments in a province, or that they cannot confer upon municipalities the right of self-protection

and of protecting the citizens of a locality against the dangers of similar industries.

The By-law was made under 37 Vict. c. 51, s. 123, ss. 2, Quebec (Charter of Montreal), and 42-43 Vict. c. 53, s. 34, ss. 8. The counsel for the city says that this power is comprised in the words "municipal institutions." If the city could not deal with these matters under its charter, the greater part of the municipal regulations would be *ultra vires*, and the municipalities would be incapable of repressing abuses affecting health or the security of citizens, and the words "municipal institutions" would have no meaning. The discussions which have already taken place in our Courts respecting the liquor laws throw a good deal of light on the respective powers of the Dominion and Provincial legislatures. In *Sulte & The City of Three Rivers* it was held that the power of the Dominion legislature to pass a general prohibitory liquor law as incident to its right to legislate as to public wrongs, is not incompatible with a right in the provincial legislatures to pass prohibitory liquor laws as incident to municipal institutions (5 Legal News, p. 330); and in the case of *Poulin & The City of Quebec*, (7 Q. L. R. 337), Mr. Justice Tessier very pertinently asks the question, Is it not part of the municipal institutions to make disciplinary and police regulations to prevent disorder on Sunday and at night, by compelling tavern and saloon-keepers to keep their drinking places closed during that time? Can there be any question as to the power of our local legislature or even our municipal corporation, to prevent the sale and storage of powder except in certain places, and with certain precautions for the safety of the public? And yet this is a matter of trade, like any other.

I am justified in concluding that the power of the Dominion Parliament to pass a general law of nuisances as incident to its rights to legislate as to public wrongs, is not incompatible with a right in the provincial legislatures to pass the clause authorizing by-law 130 as incidental to municipal institutions.

Certiorari quashed.

Macmaster, Hutchinson & Weir for petitioners.

R. Roy, Q.C., for the City of Montreal.

SUPERIOR COURT.

SHERBROOKE, June 26, 1883.

Before BROOKS, J.

GRIFFITH, Petitioner, & RIOUX *et al.*, Respondents.
Temperance Act, 1864—Prohibition.

- Held, 1. That the Act 34 Vic., ch. 2, Quebec (License Act, 1870), and the Municipal Code—are ultra vires of the Quebec Legislature, in so far as they pretend to repeal the procedure clauses or any part of the Temperance Act of 1864.*
- 2. That the incorporation of a village as a Town Corporation under special charter does not relieve the territory comprised within its limits from the operation of the Temperance Act of 1864, which had been brought into force by a by-law of the County Municipality of which the village had formed a part.*
- 3. That the proceeding in question was not beyond the jurisdiction of the District Magistrate.*

PER CURIAM. This is a petition by said Edward Griffith, asking that respondents, George E. Rioux, District Magistrate, and Allan D. G. Hazle, complainant, be restrained from proceeding with a prosecution brought before said District Magistrate in November, 1882, by said complainant Hazle, against said petitioner, for having on the 18th September, 1882, sold intoxicating liquors in quantity less than five gallons, contrary to the Temperance Act of 1864, 27 and 28 Vic., cap. 18 (Dunkin Act), and asking the penalty prescribed by that Act, of \$50.00; alleging:

1st. That said Act of 1864 was not in force in Richmond, and no such penalty as \$50.00 existed. That the only penalty was \$75.00, provided by Quebec License Act of 1878.

2nd. That petitioner had a shop license under hand of Revenue Inspector.

3rd. That if the Temperance Act of 1864 was ever in force in Richmond, it had ceased, by reason of incorporation of the Town of Richmond, under special charter, 45 Vic., cap. 103, to form part of the territory of County of Richmond, ceased to be bound by the by-laws of said county, and therefore the Temperance Act not in force there. That respondent Rioux had no jurisdiction to try the case, but had illegally proceeded to hear the evidence, and was about to render judgment, and was about to declare the License Act of 1870, so far as it

repeals the 27th and 28th Vic., cap. 18, and sec. 1086 of Municipal Code, so far as it repeals said 27th and 28th Vic., cap. 18, *ultra vires*.

The petitioner alleges, besides the repeal of all those portions of 27 and 28 Vic., cap. 18, by Quebec License Act, 34th Vic., cap. 2, sec. 12, under which the prosecution was brought, that he had a perfect right to sell, having obtained a shop license from the Revenue Inspector of the District. That in March, 1877, a by-law was enacted under Dunkin Act, so called, by which it was pretended that the sale of intoxicating liquors was prohibited within the limits of Richmond County, then including the now Town of Richmond, but on 27th May, 1882, Richmond received special charter from the Legislature of Quebec, 45th Vic., cap. 103, and since then, it has formed no portion of the county, and the said by-law has had no force there. That by its charter, Richmond had specially granted to it, the right to restrain, regulate or prohibit traffic in liquor, and on 19th June, passed a by-law, regulating the license fee, and petitioner had paid the same as well as the Government fees, and obtained a shop license, and that respondent Rioux had no right or jurisdiction to question the validity of repealing statutes, or investigate said case.

Respondent Rioux appeared and declared "qu'il s'en rapporte à justice."

Respondent Hazle persisted in his right to proceed under Temperance Act, alleging that this Act had never been repealed, *i.e.*, those portions under which he was proceeding, and that any action by the Legislature of Quebec, so far as it pretended to repeal any of said Act, was *ultra vires*; that it was specially provided by the charter of Richmond Town, 45 Vic., cap. 103, sec. 3, that "the by-laws, orders, rolls and municipal Acts, which governed the territory heretofore forming the Village of Richmond, shall continue in force until they are amended, repealed or replaced by the Town Council to be hereafter elected."

That no repeal of the Temperance Act had been had, and Richmond Town had no right, by by-law or otherwise, to authorize the issuing of licenses, or grant certificates, and their action was null in that respect; that the "Town Council to be hereafter elected," could not be elected under said Act until January, 1883, while the offence committed was in November,

1882; that Respondent Bioux did not exceed his jurisdiction in hearing said case; that license had no effect on prosecution. 27 and 28 Vic., cap. 18, sec. 12, sub-sec. 2.

Petitioner Griffith filed, amongst other documents, copies of License By-law of Town of Richmond of June 19, 1882, styled License By-law, authorizing collection of certain license fees, fixing \$60 as fee to be paid for shop licenses. And the by-law of County Council, March 14th, 1877, prohibiting, under Temperance Act, sale of liquors in said county, with certificate of approval thereof on 19th April, 1877, by municipal electors.

No evidence is taken, but the judgment is sought upon the law as applicable to the case; and at the argument, it was stated, by both petitioner and respondent, that they desired a judgment upon the point as to the power of the Legislature to repeal the provisions of the Temperance Act, providing penalty and procedure for illicit sale of intoxicating liquors, and upon the power of the Legislature to do indirectly, *i.e.*, by granting the charter 45 Vic., cap. 103, what, it was alleged, they could not do directly, confer upon the Town of Richmond, the right to *restrain, regulate or prohibit* the sale of any spirituous, alcoholic, or intoxicating liquors within the limits of the town; it being urged by petitioner that the by-laws of the Council of 19th June, 1882, regulating sale, *i.e.*, fixing fees implied under their charter, repealed the County By-law, prohibiting the sale.

The first and main question is:

Had the Local Legislature a right to enact 34 Vic., cap. 2, Sec. 197, by which those parts of 27 and 28 Vic., cap. 18, which provide for penalties and procedure to enforce them, were repealed?

In order to determine this, it is necessary to examine the provisions of the B. N. Act, and see if this power could come under the class of subjects, enumerated in Sec. 92, with regard to which the Legislature was empowered *exclusively* to make laws. If so, it must be under sub-Secs. 8, 9, 13 or 16.

The Temperance Act being in force at the time of Confederation, remained so, "until legally repealed, abolished, or altered by the Parliament of Canada, or by the Legislature

of the respective Provinces, according to the authority of the Parliament, or of the Legislature under this Act." Sec. 129 B. N. A. Act. It is contended that by the decision in Q. B., 1882, *The Corporation of Three Rivers & Sulte*, in which Mr. Justice Ramsay declared: "We hold that under a proper interpretation of Sub. Sec. 8, the right to pass a prohibitory liquor law for the purpose of municipal institutions, has been reserved to the Local Legislatures by the B. N. A. Act," it follows that the Legislature had the power to repeal the Temperance Act, but this, I think, does not at all follow, even if for the purposes of Municipal institutions, the Legislature could *prohibit*. But it must be remarked that this case was that of Three Rivers incorporated prior to Confederation, *i.e.*, in 1857, and which by its charter had certain special powers as to restrictions and conditions under which inspectors should grant licenses, and so far as report goes no prohibition was actually made, but only an amendment to a By-law, fixing the fees. Can they repeal a law passed by the late Province of Canada, which declared what was the penalty for illicit sale, and prescribed the mode in which its payment should be enforced?

As against this decision we have the declaration of the Chief Justice of the Supreme Court in the case of the *City of Fredericton*, S. C. Reports, vol. 3, pp. 542, 543, *et seq.*: "When I had the honor to be Chief Justice of New Brunswick, the question of the right of the Local Legislature to pass laws prohibiting the sale or traffic in intoxicating liquors, came squarely before the Supreme Court of that Province, and that Court in the case of *Regina v. The Justices of Queen's County*, unanimously held that the Legislature had no power or authority to prohibit the sale of intoxicating liquors, and declared the Act passed with that intent, *ultra vires*, and therefore, unconstitutional. I am of the same opinion now," &c., &c.

In this judgment concurred Fournier, Taschereau and Gwynne, JJ. dissenting. Henry, J. dissenting.

Taschereau, J., says; p. 557: It is clear that the Canada Temperance Act of 1878 could not be enacted by the Provincial Legislatures, for the simple reason that they have only the powers that are expressly given them by the

B. N. A. Act, and this does not give them the power to effect such legislation.

It would seem that if they could not pass the Canada Temperance Act of 1878, they could not have passed that of 1864, and Mr. Justice Ramsay says in the *Three Rivers & Saulte* case, "I do not see how a Legislature has power to *repeal* what it cannot *re-enact*."

In the present instance they have repealed portions of the Act of 1864, "in so far as relate to matters within this Province and matters within the control of the Legislature of Quebec," and have made new provisions, increasing the penalty.

Does this come within either sub-sections 8 or 9 of Sec. 92 of the B. N. A. Act?

The legislation is certainly not municipal, because it merely says that for a violation of the By-law prohibiting altogether the sale, the penalty shall be for selling without a license, \$75, instead of \$50.

It cannot be contended that this is given for the purposes of municipal institutions, as the only way in which it could be so construed would be if the prosecution had been in the name of the municipality, but here it is by a private individual.

Again, it cannot be said to come under sub-sec. 9, as fines and penalties cannot be imposed "for the purpose of raising a revenue for provincial, local or municipal purposes."

It is not a matter of police regulation. See *Poulin v. The Corporation of Quebec*. Ch. Justice Meredith says (and his judgment was sustained in appeal, Q. L. Reports, vol. 7, p. 339) "Considering that the Parliament of Canada, under the power given to it to regulate trade and commerce, *alone* has the power to prohibit the trade in intoxicating liquors, yet that the provincial legislatures, under the power given to them, may, for the *preservation of good order*, in the municipalities which they are empowered to establish, and which are under their control, make *reasonable police* regulations, although such regulations may, to some extent, interfere with the sale of spirituous liquors."

Ramsay, J., said: "It seems to me that this is purely a matter of police regulation, and consequently it is within the powers of municipal corporations, and that the exercise of such power cannot be considered as a *restriction of trade and commerce*."

Caron, J., held in *Hart v. The Corporation of the County of Missisquoi*, 3 Q. L. R., p. 170: "Que les pouvoirs accordés aux conseils des comtés, par l'Acte de Tempérance de 1864, ne pouvaient être ni modifiés, ni abrogés par la législature de Québec, parce que ces pouvoirs concernent l'industrie et le commerce, qu'ils sont de contrôle exclusif du Parlement du Canada."

Upon this point there would seem to be little doubt. Sec. 91 of B. N. A. Act, s. sec. 2, confers exclusively the regulation of trade and commerce upon Parliament.

The Supreme Court of Canada decided, in the case of the *City of Fredericton*—Supreme Court Reports, vol. 3, page 505—that under sub-sec. 2 of sec. 91 of B. N. A. Act, 1867, in regulation of trade and commerce, the Parliament of Canada *alone* has the power of prohibiting the traffic in intoxicating liquors in the Dominion or in any part of it.

In *Russell & The Queen*—Privy Council appeal cases, 1882, page 842—the Privy Council, in declaring the Temperance Act of 1878 within the power of Parliament, say: "Their Lordships have come to the conclusion that the Act in question does not fall within any of the classes of subjects assigned exclusively to the Provincial Legislatures, it becomes unnecessary to discuss the further question, whether its provisions also fall within any of the classes of subjects enumerated in Sec. 91. In abstaining from this discussion, they must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other Judges who held that the Act, as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subjects, "the regulation of trade and commerce," enumerated in that section, and was, on that ground, a valid exercise of the legislative power of Canada."

The Provincial Legislatures have only such powers as have been conferred upon them by the B. N. A. Act, and the whole of the balance or residuum is in the Parliament of Canada.

The Privy Council has declared that Parliament has the right to legislate for the whole Dominion on the subject.

The Supreme Court of Canada has declared that Parliament has not only the right but the sole right to prohibit the sale of intoxicating liquors in the Dominion or in any part of it.

It is conceded that the Legislature cannot repeal what it cannot re-enact.

The power to prohibit is admittedly not exclusively conferred upon the Legislature, and not being exclusively given under the B. N. A. Act to the Legislature, Parliament can legislate.

The Canada Temperance Act, 1864, passed by Old Canada, could only be repealed by Parliament, as the first 10 sections have been by Canada Temperance Act, 1878. If there is any conflict of authority as to who shall legislate upon the subject, the Legislature must yield to Parliament. Parliament has legislated. It has declared as to what municipalities the Act of 1864 is repealed, i.e. the first 10 sections. It has provided where *it is not in force*, new machinery for prohibiting; it has provided penalties for infraction of the law and procedure to enforce, and if it can do this, which the Privy Council has declared it can—the local legislature cannot have concurrent powers. Our Parliament must be supreme. Lord Carnarvon said in the discussion of his bill before the House of Lords: "That the authority of the Central Parliament will prevail whenever it may come in conflict with the Local Legislature, and any residue of legislation if any unprovided for in the specific classification, will belong to the central body." If this power belongs to Parliament, and it does, if it is not *exclusively* given to the Legislature, which is not pretended, the Legislature have, by License Act and its amendments, and by Municipal Code Art. 1086, exceeded its authority.

I cannot in deference to the decisions in this matter, declare otherwise than that the amendments to the Temperance Act of 1864, are *ultra vires*.

The next question which arises is: Could the Legislature do indirectly, i.e., by 45th Vic., cap. 103, incorporating the Town of Richmond, and giving it power to restrain, regulate or prohibit the sale of liquors, what they could not do directly?

I do not think it necessary to enlarge upon this. The Legislature could not so, legally, act, nor has the Town of Richmond made any By-law which can be said, even if they had the power, to have repealed the By-law passed under the Dunkin Act. They have fixed, in case licenses are granted, a fee to be paid to the municipality, under sub-section 8, of section 92 of the B.N.A.

Act, for the purpose of raising municipal revenue; the power having been given them by their charter, to regulate the sale in all cases, provided it could legally be sold at all.

As to the third point, that the separation of Richmond (Town) from the County, withdrew it from the operation of the By-law, enacted when it was in the county, it is, I think, equally clear that such could not have been the effect, as thus the Legislature would have been doing, indirectly, what they could not directly do.

I have thus referred to the points raised by the parties and argued with great ability, on both sides of this case, irrespective of the question if the District Magistrate had jurisdiction to try this case.

The prohibition could only be addressed to an inferior court whenever it *exceeds its jurisdiction*.

I find in this case that Petitioner appeared before respondent Rioux, accepted the jurisdiction by pleading to the merits, and according to his own allegations, only applied for the writ when he became convinced that the judgment was about to go against him.

I think that the Court below had jurisdiction that petitioner accepted that jurisdiction, by appearing and pleading as he did; *Simard v. Corporation of Montmorency*, Q. B., 8 *Revue Legale*, p. 546, and the result must be that the Writ of Prohibition is set aside and quashed, and the petition dismissed with costs, in favor of respondent Hazle.

H. B. Brown for petitioner.

J. J. MacLaren for respondents.

SUPREME COURT OF CANADA.

OTTAWA, JUNE, 1883.

RITCHIE, C.J., STRONG, FOURNIER, HENRY, TASCHEREAU and GWYNNE, JJ.

POULIN v. LA CORPORATION DE QUÉBEC.

Prohibition—Local Jurisdiction.

The Provincial statute 42-43 Vict. (Que.) chap. 4, ordering that places in which spirituous liquors are sold shall be closed on Sunday, is a police regulation, and is not in excess of the powers of the local legislature.

The appeal was from a judgment of the Court of Queen's Bench in appeal, rendered at Quebec, confirming a judgment of the Superior Court, Meredith, C. J. (See 7 Q.L.R. 337, and 5 L.N. 3.)

RITCHIE, C.J. I cannot see how it can be said that prohibition will not lie without first determining whether the Act is *ultra vires* or not; for if the Act is *ultra vires* then I can see no reason why prohibition would not be a proper remedy, because there could then be no pretence that the Recorder's Court could have jurisdiction over an offence alleged to be created by a statute which had no legal existence; but holding the Act to be *intra vires*, (that is within the legislative power of the Provincial Legislature), I fully appreciate the position taken by Mr. Justice Ramsay, that the Recorder's Court, having jurisdiction over the subject matter legislated on—however badly it may judge—it cannot be stopped by prohibition on the pretext that it has misconstrued the Act. Mr. Justice Ramsay clearly acted on this view, for before holding that prohibition would not lie, he expressly held that the Local Legislature had authority to prohibit or regulate the sale of liquors in saloons or taverns on Sunday, or at particular times, as being a matter of police regulation, and consequently within the powers of municipal corporations. When in the case of *Reg. v. The Justices of King's*, I was called upon to adjudicate on the right of the Provincial Legislatures to prohibit absolutely the sale of spirituous liquors, and when I arrived at the conclusion that the legislative power to do this rested in the Dominion Parliament, I advisedly and carefully guarded the enunciation of that conclusion in these words:—"We by no means wish to be understood that the Local Legislatures have not the power of making such regulations for the government of saloons, licensed taverns, etc., and the sale of spirituous liquors in public places, as would tend to the preservation of good order and the prevention of disorderly conduct, rioting, or breaches of the peace. In such cases, and possibly others of a similar character, the regulations would have nothing to do with trade or commerce, but with good order and local government, matters of municipal police and not of commerce, and which municipal institutions are peculiarly competent to regulate." I still think, as I did then, that a provision such as section one. of 42 and 43 Victoria, chapter 4 of the Quebec Act, is within the Legislative authority of the Provincial Legislature as being simply a local police regulation, and which the Legislature has—as incident to its power to legislate on matters

in relation to municipal institutions—a right to enact. As at the time of the passing of this Act, and at the time of the committing of, and the conviction for, the alleged breach of the law, there was no Dominion legislation contravening in any way the provisions of this Provincial law, it is not necessary for the purpose of deciding this cause to inquire or determine if, and in what particulars, and to what extent the legislation of either will prevail over that of the other, when the Dominion Parliament, legislating for the peace, good order, etc., of the Dominion, or on the subject of trade and commerce in connection with the traffic in intoxicating liquors, conflicts with the Provincial legislation. In the view I take of the inapplicability of the remedy by prohibition, the Act being in my opinion *intra vires*, it is unnecessary to express any opinion as to the construction of the first section of 42 and 43 Victoria, chapter 4, though I by no means wish it to be understood that I think the construction placed on the statute by the Recorder's Court incorrect. I merely express no opinion on it as not being necessary for the determination of the case before us. The appeal, in my opinion, should be dismissed.

Judgment confirmed.

LOUISIANA DECISIONS.

Volume I of McGloin's Reports of cases in the Courts of Appeal of the State of Louisiana, is now completed. The volume contains the following, among other decisions:—

Agency.—1. Where a party conducts a business, for which the services of a superintendent or manager are essential, and does not himself act as such manager or superintendent, there is a representation that the parties actually performing such essential duties are his agents, with necessary powers.—*Lochte v. Gélé*, p. 52.

2. One dealing with a factor may be sued by the principal; but, ordinarily, the former may, in such a suit, avail himself of all the defences which would have been open to him had the demand been made in the name of the factor.—*Delaune v. Agar*, p. 97.

3. Where the owner of real property agrees to pay a certain sum to a broker for securing a purchaser, the compensation of the broker is earned so soon as the purchaser is secured.—*Houston v. Boagni*, p. 164.

4. A bank taking paper for collection is, as

to it, the agent of the depositor, who may at any moment revoke the agency and reclaim the deposit; and even where the bank has permitted the depositor to draw against such deposit, this does not destroy the agency and divest such depositor of his title.—*La. Ice Co. v. State Nat. Bank*, p. 181.

5. An employer continuing an employee in his service, after learning of negligence or misconduct on the part of the latter, is estopped from subsequently complaining.—*Marshall v. Sims*, p. 223.

Appeal.—Where a firm and its members are sued and condemned *in solido*, the appeal of the firm brings up the entire case, and avails the members.—*Marshall v. Sims*, p. 223.

Bank.—The certification of a check is equivalent to the acceptance of a bill—the check standing on the same footing as an accepted bill.—*La. Ice Co. v. State Nat. Bank*, p. 181.

Bills and Notes.—1. The acceptor of a commercial draft or bill of exchange guarantees the signature and the right of the drawer to draw the same.—*Agnel v. Ellis*, p. 57.

2. One sued upon his own promissory note cannot impeach the title of the holder, until he has shown his interest in such an issue.—*Carroll v. Peters*, p. 88.

Common carrier.—1. Tow boats are common carriers.—*Wood v. Harbor Protection Co.*, p. 121.

2. In case of collision between a vessel moored and one in motion, the presumption is against the latter.—*Id.*

Costs.—Where in a former litigation, a party has had judgment for his costs, he cannot sue again for such costs.—*Levy v. Flash*, p. 124.

Default.—1. A putting in default is not necessary where the party owing compliance is unable to perform, or where, on demand, he refuses absolutely to comply or seeks to impose conditions foreign to the contract.—*Alford v. Tibbler*, p. 151.

2. A suit to rescind a transaction must be preceded by a tender of restitution; such as, if accepted, would restore all parties to the condition they were in before such transaction.—*Adams v. Moulton*, p. 210.

Garnishment.—Where a garnishee answers without reservation, he cannot subsequently complain of insufficiency of notice or of information.—*Carroll v. Wallace*, p. 316.

Lease.—Where the true condition of rented premises can be readily observed at the time of leasing, the tenant cannot subsequently complain of a defect in the drainage.—*Lorenzen v. Woods*, p. 373.

Obligations, Interpretation of.—1. Where a party has for years been employed by another, during which time his salary has been several times increased, and throughout board has been considered as included, without special stipulation to that effect, the former has the right, in subsequent negotiations, to consider his board as still included; and if the employer contemplates a change in this regard, it is incumbent on him to mention the fact.—*Godbold v. Harrison*, p. 31.

2. Where defendants purchased 200 casks of seltzer water, packed in Prussia, each cask of 100 stone jugs, and it is shown that such casks cannot be transported without some breakage of jugs: *held*, that these circumstances entered into the contract, and where the actual breakage is not beyond what is usual, the vendee cannot demand a rescission.—*Hays v. Smith*, p. 193.

3. A party cannot demand the partial rescission of a contract.—*Marshall v. Sims*, p. 223.

4. A contract for the sale of cotton futures where neither delivery nor payment of price is contemplated, but only an adjustment of differences, is aleatory and void. The intent to wager may be implied, and circumstantial evidence is admissible to show its character.—*Succession of Condon*, p. 351.

Parent and Child.—The father is liable for damages occasioned by his minor child residing with him, or placed by him with other persons.—*Marrioneaux v. Brugier*, p. 257.

Railroad.—Where a citizen cannot prevent the application of the public streets, by lawful authority, to the use of a railroad for right of way, etc., he may insist that such streets be used in a manner least injurious to him.—*Laviosa v. Railroad*, p. 299.

Society.—Where an "unauthorised corporation," or "private society," is organized for the purpose of creating a common fund and providing a common tomb, and the members are to receive, in return for dues and fees, relief and treatment during illness, burial at death, and certain specified assistance to their widows and orphans when these last are left in necessitous circumstances: *held*, that the death of a member does not dissolve the association. The interest of a member in the assets, etc., of such a society, lapses with his death, and does not pass to his heirs.—*Sociedad v. Docurro*, p. 218.

The Legal News.

VOL. VI.

JULY 14, 1883.

No. 28.

THE VALUE OF TRIAL BY JURY.

Mr. Justice Stephen, in his new History of the Criminal Law, enters into a comparison of French and English criminal procedure. His lordship then makes some observations on "the positive value of trial by jury as practised and understood in England." He says:—

"It is perhaps the most popular of all our institutions, and has certainly been made the subject of a kind and degree of eulogy which no institution can possibly deserve. All exaggeration apart, what is its true value?"

"It may be regarded in several different lights.

"The first question is, Are juries just? The second, Are they intelligent enough for the duties they have to perform? The third, What are the collateral advantages of the institution? Upon each of these points it is necessary to compare juries to judges sitting without juries, for the choice lies between these two tribunals. Our experience of trials by judges without juries, in criminal as well as in civil cases, has, in the last two generations become very extensive. In the first place, the judges of the Chancery Division of the High Court are continually called upon to determine questions of fact which in many instances are exactly like those that are determined in criminal cases; as, for instance, where fraud is alleged as a ground for setting a transaction aside. The same is true of the county court judges and of the courts of summary jurisdiction, which have extensive powers of fine and imprisonment. Applications to the judges of the Queen's Bench Division sometimes involve the determination of similar questions. I have, for instance, known a case in which the decision of the question whether a father should be deprived of the custody of his child depended upon the question whether he had committed a crime, which question was tried and determined by a judge without a jury. The trial of civil cases without juries has also become a matter of everyday occurrence. Finally, in British India, trial by a judge alone is in all criminal cases the rule, and trial by jury the rare exception.

"There is a considerable difference in the manner in which cases are tried by judges sitting alone. In cases tried without a jury by a judge of the High Court, notes are taken just as if the case was tried by a jury; and in the case of an appeal, they are forwarded to the Court of Appeal for their information. If serious criminal cases were to be tried by judges without juries, I think that notes should be taken both by the judge, and, in capital cases, by a shorthand writer as well; and I think the judge should give his reasons for his decision, and that if he did not give them in writing they should be taken down by a shorthand writer, and read and corrected by the judge. In such cases I think there should be an appeal both on the law and on the facts to the Court for Crown Cases Reserved, or whatever Court might be substituted for it. In comparing trial by jury with trial by a judge without a jury, I assume the establishment of such a form of trial as this.

"First, then, as to the comparative justice to be expected of trials by jury and trials by a judge without a jury. Trial by a judge without a jury may, I think, be made, practically speaking, completely just in almost every case. At all events, the securities which can be taken for justice in the case of a trial by a judge without a jury are infinitely greater than those which can be taken for trial by a judge and jury.

"1. The judge is one known man, holding a conspicuous position before the public, and open to censure and, in extreme cases, to punishment if he does wrong: the jury are twelve unknown men. Whilst the trial is proceeding they form a group just large enough to destroy even the appearance of individual responsibility. When the trial is over they sink back into the crowd from whence they came, and cannot be distinguished from it. The most unjust verdict throws no discredit on any person who joined in it, for as soon as it is pronounced he returns to obscurity.

"2. Juries give no reasons, but judges do in some cases, and ought to be made to do so formally in all cases if juries were dispensed with. This in itself is a security of the highest value for the justice of a decision. An unskilled person may no doubt give bad reasons for a sound conclusion, but it is nearly impossible for the most highly skilled person to give good reasons for a bad conclusion; and the attempt to do so

would imply a determination to be unjust which would be most uncommon.

"3. From the nature of the case there can be no appeal in cases of trial by jury, though there may be a new trial. There can be an appeal where the trial is by a single judge.

"This may not, at first sight, be obvious, but it is a consequence of the circumstance that a jury cannot give their reasons. An appeal, properly so called, implies a judgment on the part of the Court appealed from and an argument to show that it decided wrongly, which cannot be unless the reasons of the decision are known. If an appeal proper lay from the decision of a jury, and if it took the form of a re-hearing before a court of judges, trial by jury might as well be abolished.

"4. Experience has proved that the decisions of single judges are usually recognized as just. There are very few complaints of the decisions either of magistrates or county court judges on the ground of injustice. I never heard of a complaint of injustice in a trial by a judge of the High Court without a jury. Arbitrations, in which the arbitrator gives no reason and is subject to no appeal, are not only common but are on the increase. This would scarcely be the case if confidence were not felt in the justice of arbitrators.

"As to juries, experience no doubt has shown, and does continually show, that their verdicts also are just in the very great majority of instances, but I am bound to say I think that the exceptions are more numerous than in the case of trials by judges without juries.

"In cases of strong prejudice juries are frequently unjust, and are capable of erring on the side either of undue convictions or of undue acquittals. They are also capable of being intimidated, as the experience of Ireland has abundantly shown. Intimidation has never been systematically practised in England in modern times, but I believe it would be just as easy and just as effective here as it has been shown to be in Ireland. Under the Plantagenets, and down to the establishment of the Court of Star Chamber, trial by jury was so weak in England as to cause something like a general paralysis of the administration of justice. Under Charles II. it was a blind and cruel system. During part of the reign of George III. it was, to say the least, quite as severe as the severest judge without a

jury could have been. The revolutionary tribunal during the Reign of Terror tried by a jury.

"There are no doubt some things to be set against this. It is often said in delicate terms that some degree of injustice is a good thing. The phrases in which this sentiment is conveyed are to the effect that it may sometimes be desirable that the strict execution of the law should be mitigated by popular sentiment, of which juries are considered to be the representatives. Whether it is a greater evil that a bad law should be executed strictly or capriciously is perhaps disputable, but it admits of no doubt that laws unfit to be strictly executed ought to be repealed or modified. Parts of the criminal law were no doubt formerly cruel and otherwise objectionable. I can understand, though I do not share, the sentiment which admires juries who perjured themselves by affirming a five pound note to be worth less than forty shillings in order to avoid a capital conviction, or who refused to give effect to the old law of libel; but these are things of the past. I know of no part of our existing law which requires to be put in force capriciously. I see, for instance, no advantage in acquittals in the face of clear evidence for bribery, or for sending ships to sea in a dangerous condition, or for libels on private persons who happen to be disreputable and unpopular, or for frauds committed upon money-lenders, or for crimes committed by pretty women under affecting circumstances. . . .

"The next point to consider is the comparative wisdom or intelligence of judges and juries. I think that a judge ought to be, and that he usually is, a man of far greater intelligence, better education, and more force of mind, than any individual member of the juries which he has to charge, but it must be remembered that there is a great difference between jury and jury. The force and effect of evidence can hardly be tested better than by the impression which it makes on a group of persons large enough to secure its being looked at from many different points of view and by people of different habits of mind. But this advantage is obtained only when all the jurors listen to the whole of the evidence; and it continually happens that several of them are half asleep, or listen mechanically, or think about something else, and that when the verdict is considered they follow the lead of any member of

the jury who chooses to take the lead. Again, as to experience, it is very unlikely that any judge should have greater experience of the kind required upon a criminal trial than all the twelve men in the jury box put together, unless indeed they are unusually stupid. A really good special jury will usually consist of, or as a rule contain, men in every respect as competent to judge of the effect of evidence as any judge, and the probability that they or some of them will possess experience bearing on the case which has not come in the judge's way is considerable. I think that as far as skill and intelligence go it would be impossible to have a stronger tribunal than a jury of educated gentlemen presided over by a competent judge. I cannot, however, say much for the intelligence of small shopkeepers and petty farmers, and whatever the fashion of the times may say to the contrary, I think that the great bulk of the working classes are altogether unfit to discharge judicial duties, nor do I believe, rare exceptions excepted, that a man who has to work hard all day long at a mechanical trade will ever have either the memory, or the mental power, or the habits of thought, necessary to retain, analyse, and arrange in his mind the evidence of, say, twenty witnesses to a number of minute facts given perhaps on two different days. Jurors almost never take notes, and most of them would only confuse themselves by any attempt to do so, and I strongly suspect that a large proportion of them would, if examined openly at the end of a trial as to the different matters which they had heard in the course of it, be found to be in a state of hopeless confusion and bewilderment. I should be far from saying this of good special juries, but I think that the habit of flattering and encouraging the poor, and asserting that that they are just as sensible and capable of performing judicial and political functions as those who from their infancy have had the advantages of leisure, education and wealth, has led to views as to the persons qualified to be jurors which may be very mischievous. I think that, in all criminal cases of any considerable difficulty or importance, there ought to be at least a power to summon special juries. In short, I think a good judge and a good special jury form as strong a tribunal as can be had, but I think a judge without a

jury would be a stronger tribunal than a judge and an average common jury.

"There is a third point of view from which trial by jury must be considered, namely, its collateral advantages, and these, I think, are not only incontestable in themselves, but are of such importance that I should be sorry to see any considerable change in the system, though I am alive to its defects. They are these:—

"In the first place, though I do not think that trial by jury really is more just than trial by a judge without a jury would be, it is generally considered to be so, and not unnaturally. Though the judges are, and are known to be, independent of the executive Government, it is naturally felt that their sympathies are likely to be on the side of authority. The public at large feel more sympathy with jurymen than they do with judges, and accept their verdicts with much less hesitation and distrust than they would feel towards judgments however ably written or expressed.

"In the next place, trial by jury interests large numbers of people in the administration of justice and makes them responsible for it. It is difficult to over-estimate the importance of this. It gives a degree of power and of popularity to the administration of justice which could hardly be derived from any other source.

"Lastly, though I am, as every judge must be, a prejudiced witness on the subject, I think that the position in which trial by jury places the judge is one in which such powers as he possesses can be most effectually used for the public service. It is hardly necessary to say that to judges in general the maintenance of trial by jury is of more importance than to any other members of the community. It saves judges from the responsibility—which to many men would appear intolerably heavy and painful—of deciding simply on their own opinion upon the guilt or innocence of the prisoner. If a judge sums up for a conviction and the jury convict, they share the responsibility with him and confirm his views by their verdict; and the same may be said if they follow his suggestion in acquitting. If they acquit when he suggests a conviction, he is spared from what is always a painful task—that of determining on the sentence to be passed. If they convict when he suggests an acquittal, he can, if he is

decidedly of opinion that the prisoner is innocent, in practically all cases, procure a pardon; I think he ought to have a legal right to direct a new trial. On the other hand, he may not unfrequently feel that the jury have done substantial justice in overlooking some deficiency or weakness in the legal proof of the case, which had occurred to his mind, and in this case the result is that, without any default on his part, a criminal meets his deserts, although the proof against him may not quite come up to the legal standard. I remember a case many years ago in which a surgeon was convicted of manslaughter for causing the death of a woman in delivering her of a child. The judge (the late Baron Alderson) summed up strongly for an acquittal, remarking on the slightness of the evidence that the man was drunk at the time; but the jury convicted him, well knowing that he was a notorious and habitual drunkard.

"For these reasons, the institution of trial by jury is so very pleasant to judges that they may probably be prejudiced in its favour. I think, however, that the institution does place the judge in the position in which, with a view to the public interest, he ought to be placed—that of a guide and adviser to those who are ultimately to decide, and a moderator in the struggle on the result of which they are to give their decision. The interposition of a man, whose duty it is to do equal justice to all, between the actual combatants and the actual judges of the result of the combat, gives to the whole proceedings the air of gravity, dignity, and humanity, which ought to be, and usually is, characteristic of an English court, and which ought to make every such court a school of truth, justice, and virtue. In short, if trial by jury is looked at from the political and moral point of view, everything is to be said in its favour, and nothing can be said against it. Whatever defects it may have might be effectually removed by having more highly qualified jurors. I think that to be on the jury list ought to be regarded as an honour and distinction. It is an office at least as important as, say, that of guardians of the poor, and I think that if arrangements were made for the comfort of jurors, and for the payment of their expenses when on duty, men of standing and consideration might be willing and even desirous to fill the position."

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, July 9, 1883.

Before TORRANCE, J.

HATTON v. SENECAI.

SENECAI v. HIBBARD.

Contract—Default—Delivery of bonds.

Where S. transferred to H. his interest under a contract in consideration of the delivery to him of certain railway bonds, and S. afterwards repudiated this transfer, and himself collected the claim so transferred, but still retained the bonds, held, that H. was entitled to recover the bonds or to be paid their face value, with interest coupons, etc.

The demand of the plaintiff was, as transferred of Ashley Hibbard, to recover 35 bonds of the Montreal, Chambly & Sorel Railway company, of the par value of \$1000 each, or the sum of \$35,000, with interest from 2nd January, 1874.

The declaration set forth an agreement, dated 17th Oct., 1872, between the company and Senecai, by which the contract between them was cancelled for the consideration of 25 per cent. of the Government subsidy to be drawn by Senecai that on the 15th May, 1875, Senecai, in consideration of the delivery to him of 35 of said bonds transferred to Hibbard all his interest in the contract of 17th Oct., 1872; that Senecai afterwards, in 1877, repudiated the transfer of 15th May, 1875, alleging that the same had been cancelled, and claimed from the Government said 25 per cent.; that afterwards on the 22nd November, 1877, he transferred his claim under the agreement of 17th October, 1872, to Isidore Hurteau, who obtained payment from the Government on the 5th Nov., 1879, of \$20,742.74. that the defendant, notwithstanding said repudiation and cancellation, retained said bonds and sold and disposed of them for his own benefit. that on the 26th January, 1882, Hibbard sold and assigned, for value, the bonds and coupons to the plaintiff; and said assignment was served upon Senecai on the 2nd May, 1882.

The plea of Senecai admitted the agreement of the 17th October, 1872, and the receipt of the bonds from Hibbard on the 15th May, 1875, and the order on the company on the 19th May, for the payment to Hibbard of 25 per cent. of the

subsidy, with the understanding, he alleged, that they would be paid or exchanged for debentures of other solvent companies in the course of the month; that in April, 1876, Hibbard having transferred to defendant, Sénécal, his contract for the construction of the Montreal, Portland & Boston Railroad company, gave up the receipt of the 15th May, and the order of the 19th May, and in this way retroceded his rights under the deed of 17th Oct., 1872, that it was then agreed that Sénécal should keep the debentures in question in consideration of certain advances made by him to Hibbard, and in the event of the sale of the bonds, he should render an account to Hibbard, of the proceeds of the sale, compensating the claims he had against Hibbard, against the proceeds of the bonds; that the value of the bonds was merely nominal, and the company was insolvent; that plaintiff was only a *prête-nom*.

This plea was amended at the trial on the 1st June, in the following way: He (Sénécal) alleged further that in 1880 and 1881, he sold 20 of the bonds for 10 cents in the dollar, equal to \$2,000; that Hibbard was further indebted in the sum of \$1,500 for advances made to him; and another sum of \$879.36, being principal and interest of two *bons*, one of \$362.50, made 1st December, 1874, and the other for \$100, made 18th January, 1877; that Hibbard was further indebted in the amount of the judgments, namely, \$1,979.49. One of these judgments was for \$666.10, besides interest and costs, in the case of Gill against the said Railroad company and Hibbard, of which Sénécal was now proprietor, having paid it before the institution of this action; the other judgment was at the suit of the Merchants Bank against said Company and Hibbard and Sénécal for \$593.07, and interest and costs, and had been paid by Sénécal, with subrogation of the Bank's rights against Hibbard; that Hibbard owed Sénécal a further sum of \$4,000 for advances which Sénécal could not detail, but Hibbard, and he prayed compensation against plaintiff's demand if anything was due.

PER CURIAM. Dealing first with the plea of compensation, there is no proof of the transfer of the judgments, and the signification of the transfer to Hibbard before his transfer to the plaintiff. There is no legal proof of the *bons*, which are unstamped and prescribed, and which Hibbard denies that he owes.

Next, we come to the proof of the ownership of Hibbard in the bonds. The plea as amended admits accountability, and the receipt of 15th May, 1875, and the order of the 19th May upon the company for the 25 per cent., made by Sénécal, and his subsequent transferring the claim under the deed of 17th Oct., 1872, to Hurteau; and the payment to Hurteau by the Government and the verbal evidence of Hibbard sufficiently explain the position of the defendant as regards the 35 bonds. They had to be accounted for to Hibbard or his assignee, the plaintiff. As to the price paid by Mr. Hatton, we need not deal with that question. The proof is that the plaintiff is owner.

As to the amount of the condemnation, it should be for the par value, if the bonds are not returned. The value of these bonds is very uncertain and fluctuates greatly. They may have a value greatly in excess of the par value, though that does not appear here. The possession of them may give the holder the control of the road. The court cannot therefore arbitrarily reduce them to ten or twenty cents in the dollar, and if they are of so little value it will be easy for the defendant to replace them. The action of Sénécal against Hibbard is dismissed, recourse reserved.

The judgment is as follows:—

"The Court, etc.

"Considering that the defendant Louis A. Sénécal hath failed to make satisfactory proof of the allegations of his amended plea, doth overrule the same;

"Considering that the evidence of record establishes that the said L. A. Sénécal, having received from the defendant Hibbard the 35 bonds of the Montreal, Chambly & Sorel Railway Company of the par value of \$1000 each, numbered 0454—0488, and bearing date the 2nd January, 1874, and bearing interest from the said date, was bound to return the same to him, or his assignee, or to account for the same, as admitted by his amended plea;

"Considering that the delivery to him of said 35 bonds was based upon his abandonment to the defendant Ashley Hibbard, of the 25 per cent. of the Government subsidy under the receipt of date 15th May, 1875, and the order upon the Railroad Company of the 19th May, 1875, and that said Louis A. Sénécal subsequently dealt with the said subsidy as being still his

property under the deed of date 17th October, 1872, and received payment of the same through his *cessionnaire* the said Isidore Hurtean;

"Considering that plaintiff hath proved that the said Ashley Hibbard transferred to him his claim to principal and interest in said bonds by the transfer *sous seing privé* of date 26th January, 1882, then duly signified to defendant L. A. Sénécal;

"Doth condemn the said defendant Louis A. Sénécal to deliver over to the said plaintiff within fifteen days from this date the said 35 bonds, with all interest coupons, as delivered to the said defendant, and on his default of so doing within the said delay, the Court doth condemn the defendant to pay and satisfy to the plaintiff the sum of \$35,000, with interest thereon from the 2nd January, 1874, date of the said bonds, together with interest on the amount of each coupon from the date when the same became due and exigible respectively, to wit, on the sum of \$1,050, being the aggregate amount of 35 coupons due every half year, from the 2nd days of July and January in each and every year respectively, commencing on the 2nd day of July, 1874 until paid, and costs of suit, *distrains* to Messrs. Hatton & Nicols, attorneys for plaintiff;

"And on the merits of the cause No. 161, seeing that the said L. A. Sénécal hath failed to establish that he was entitled to the conclusions of his declaration in the said cause, doth dismiss said action No. 161, with costs against the said L. A. Sénécal, *distrains* to Messrs. Robertson, Ritchie & Fleet, attorneys for defendant Hibbard, reserving to said defendant, Sénécal, any recourse which he may have or pretend against said Ashley Hibbard as defendant in the two causes, No. 2226, in the Superior Court, Montreal, Gill against the Montreal, Portland & Boston Railway Company, and Ashley Hibbard, and No. 1771 of the Superior Court, Richelieu, The Merchants Bank of Canada against the said Montreal, Portland & Boston Railway Company, Ashley Hibbard, and L. A. Sénécal."

Hatton & Nicols, for plaintiff.

S. Bethune, Q.C., counsel.

Lacoste & Co., for defendant, Sénécal.

SUPERIOR COURT.

MONTREAL, July 9, 1883.

Before PAPINEAU, J.

MOLSON v. HON. J. A. CHAPLEAU AND W. W. LYNCH.

Railway Commissioner—Action.

The Commissioner of Railways under the Quebec Railway Act, 1880, being a member of the Executive Council of the Province, represents the sovereign authority, and cannot be implead-

ed before the civil courts of the Province for an act performed by him in the discharge of his duties as such Commissioner.

PAPINEAU, J. Le demandeur, contre qui ont été adoptés des procédés en expropriation de certains terrains sous l'opération de l'acte des chemins de fer de Québec, 1880, poursuit l'Hon. J. A. Chapleau et l'Hon. W. W. Lynch, le premier comme ex-commissaire et le second comme commissaire en office des chemins de fer de la Province de Québec, ainsi que Messieurs Simard, notaire, Hutchison, architecte, et Brown, écr., qui ont agi comme arbitres dans l'instance en expropriation, afin de faire annuler la sentence arbitrale, et de faire ordonner qu'il soit fait de nouveaux procédés en expropriation.

Les défendeurs l'Hon. Chapleau et l'Hon. Lynch font une exception déclinatoire, disant qu'ils sont mal à propos assignés devant cette cour.

10. Parce qu'ils sont poursuivis en leur qualité de commissaires des chemins de fer de Québec seulement, et comme tels, ils ne sont sujets à la juridiction de cette cour, hors des cas de malversation et de délits dont il n'est pas question dans la cause.

20. Parce qu'en cette qualité, ils sont membres du Conseil Exécutif et aviseurs du chef de l'État le Lieutenant-Gouverneur de la Province, et que comme tels ils ne sont que les mandataires du Gouvernement et responsables au Lieutenant-Gouverneur et à la Législature seulement.

30. Qu'il ressort de la déclaration du demandeur, que c'est au nom de Sa Majesté notre Souveraine, que ces deux défendeurs ont accompli les actes dont se plaint le demandeur, et qu'ils ne peuvent être amenés devant cette cour pour des actes dans lesquels ils n'ont été que les aviseurs et mandataires de Sa Majesté.

Le demandeur répond à cette exception déclinatoire, que ces deux défendeurs n'ont pas agi au nom de Sa Majesté dans les circonstances relatées dans sa déclaration; que ces deux défendeurs ayant été, le premier initiateur et, le second, continuateur des procédés en expropriation qui ont donné lieu à la présente poursuite, sont *justiciables* de cette cour sous les circonstances déroulées dans la demande, qui n'est que le résultat des procédés commencés par le dit Hon. Chapleau, et un incident de ces procédés devenu nécessaire pour les terminer convenablement.

Il est établi par l'exhibit No. 10 du demandeur (produit dans le dossier No. 1,245 entre les mêmes parties,) que les procédés en expropriation ont été commencés par le dit Hon. J. A. Chapleau *es qualité*, au nom de Sa Majesté.

Les défendeurs ont cité à l'appui de leurs prétentions la cause de *Church & Middlemiss*, 21 Jurist, 319; *Gidley v. Palmerston*, 3 Brd. et Bingham Rep. p. 286; 1 Todd, Parliamentary Government, p. 299 et suiv., et p. 302; *Dickson v. Combermere*, Finlayson, vol. 3; *Broom*, Constitutional Law, p. 241 et p. 617; *Unwin v.*

Woolley, 1 Durnford & East Rep. p. 674; Idem, *Mackeath v. Haldimand*, p. 180; *Church & Midlemist*, 19 L. C. Jurist, pp. 253 et 266; *Révue Critique*, p. 369 et suiv., *L'Hôtel Dieu v. Le Conseil d'Agriculture* et les autorités citées (cet article est de D. Girouard); *Mercer & Le Procureur Général d'Ontario*, 3 vol. Rapports Cour Suprême, Canada.

Le demandeur soutient que les précédents cités ne sont pas applicables à la présente cause pour plusieurs raisons. 1o. Parce que dans les causes de *Haldimand & Palmerston* les défendeurs étaient poursuivis personnellement pour des actes faits en leur qualité d'agents de Sa Majesté, pendant que dans la présente cause les défendeurs Chapleau et Lynch sont poursuivis non personnellement mais comme commissaires, et pour des actes par eux faits en cette qualité, et qu'ils sont une quasi corporation. 2o. Parce que *Haldimand* et *Palmerston* étaient réellement les représentants de Sa Majesté, pendant que les Hons. Chapleau et Lynch ne l'étaient pas. Que Sa Majesté la Reine est bien personnellement et par son représentant le Gouverneur-Général, une partie intégrante du Parlement fédéral, mais qu'elle n'est pas personnellement ni par son représentant dans la législature de la Province de Québec. Que cette exclusion intentionnelle de Sa Majesté du Gouvernement local des provinces qui composent l'Union formée en vertu de l'Acte de l'Amérique Britannique du Nord de 1867, saute aux yeux de tout lecteur attentif de cet Acte du Parlement Impérial. Ainsi dans le 3e et le 4e paragraphes du préambule de cette acte, il est question, non pas d'une fédération des anciennes provinces, mais purement et simplement de l'Union des provinces; la section 3e parle d'une seule puissance; la 4e que "l'Union sera effectuée;" "l'Union sera déclarée un fait accompli;" et la 5e, le Canada sera divisé en quatre provinces, dénommées Ontario, Québec, Nouvelle-Ecosse et Nouveau-Brunswick. "La Puissance" est une création nouvelle de la loi, et elle est divisée en quatre provinces au moment de sa création.

S'agit-il de la distribution des pouvoirs? Sec. 9: "A la Reine continueront d'être et sont par le présent attribués le gouvernement et le pouvoir exécutif du Canada." Sec. 10: "Le chef de l'exécutif, qu'il se nomme Gouverneur-Général ou administrateur, administre au nom de la Reine. Son conseil est dénommé le Conseil Privé de la Reine pour le Canada." (Sec. 11.) En un mot, toutes les sections de cette article 3 jusqu'à la 16 inclusivement démontrent la Reine comme conservant à l'égard du Canada les attributs de la souveraineté.

S'agit-il du pouvoir législatif? L'article 4, comprenant la Sec. 17 et les suivantes attribuent ce pouvoir à un Parlement composé de la Reine, du Sénat et des Communes. Quel contraste quand on descend à la part de pouvoir faite à chaque province par l'art. 5, "Constitutions provinciales," pouvoir exécutif. La Reine

s'efface, se retire. Sec. 58: Il y aura pour chaque province, un officier appelé lieutenant-gouverneur, lequel sera nommé par le gouverneur-général en conseil par instrument sous le grand sceau du Canada. Ce n'est pas un député comme le gouverneur-général peut en nommer dans les circonstances prévues dans la sec. 14. C'est un simple officier; son conseil, nommé par lui, se compose des officiers suivants: le procureur-général, le secrétaire et registraire de la province, le trésorier, le commissaire des terres de la couronne, le commissaire d'agriculture et des travaux publics, et dans la province de Québec, l'orateur du conseil législatif et le solliciteur-général. Si on passe au "Pouvoir Législatif" on n'y retrouve pas d'avantage la Reine, ni son représentant, ni même un parlement. Sec. 71: "Il y aura, pour Québec, une législature composée du lieutenant-gouverneur et de deux chambres appelées le conseil législatif de Québec et l'assemblée législative de Québec." A proprement parler ce n'est plus qu'une grande municipalité.

Un bill est-il passé dans les chambres du parlement, c'est le gouverneur-général qui le sanctionne ou refuse de le sanctionner au nom de la Reine, ou le réserve à sa sanction personnelle (Sect. 55 et 56.) Une législature provinciale a-t-elle passé une loi, la sanction, le refus de sanction et la réserve ne sont plus au nom de la Reine, mais du gouverneur-général et par le lieutenant-gouverneur. Sect. 90.

Les pouvoirs législatifs sont distribués de manière à donner les pouvoirs généraux et indéterminés en termes très compréhensifs au parlement du Canada; au contraire, les pouvoirs laissés aux législatures provinciales sont particuliers et en termes beaucoup moins compréhensifs (Sect. 91 et 92.)

Enfin, lorsque l'acte impériale s'occupe de ce qui doit être fait par le lieutenant-gouverneur, le nom de Sa Majesté n'apparaît que deux fois. C'est pour la nomination et le remplacement des conseillers législatifs (Sect. 72 et 75,) et la convocation des chambres que le lieutenant-gouverneur fait au nom de Sa Majesté (Sect. 82.) On dit ceci doit être par inadvertance, et cette supposition est fondée sur ce que ces expressions ne sont applicables qu'à la province d'Ontario et à celle de Québec; quant à la convocation des chambres pour la Nouvelle-Ecosse et le Nouveau-Brunswick il n'en est pas ainsi.

Il suit donc de tout cela, dit le demandeur, que Sa Majesté ne formant pas partie des législatures provinciales, et le statut n'ayant pas conféré au lieutenant-gouverneur les prérogatives de Sa Majesté en termes exprès, elles restent tout entières dans la personne de Sa Majesté, et ne peuvent être exercées par les lieutenants-gouverneurs; les membres du conseil exécutif provincial ne peuvent se dire représentants de Sa Majesté et comme tels non justiciables de cette cour.

Le demandeur reconnaît que le défendeur Chapleau a fait son premier procédé en expo-

priation au nom de Sa Majesté. Mais le demandeur prétend que c'est sans droit et il ajoute avec raison, il ne suffit pas à un homme de se dire représentant de Sa Majesté pour l'être réellement.

Examinons la première raison du demandeur. Les défenseurs Chapleau et Lynch ne sont pas poursuivis personnellement, mais comme commissaires. Personnellement les Hons. Chapleau et Lynch n'ont aucun intérêt dans la cause. Leur qualité de commissaires implique un commettant au nom duquel ils agissent. Si ce commettant est la Reine, elle ne peut être poursuivie devant ce tribunal. Si, au contraire, le commettant est un particulier, les particuliers ne peuvent ester en jugement qu'en leur nom personnel, si ce n'est dans les cas expressément prévus par la loi. S'ils sont une corporation, ce ne peut être qu'une corporation politique, car ils forment partie du gouvernement exécutif; ils sont les conseillers de Sa Majesté, et alors ils sont régis par le droit public et ne peuvent être assignés devant ce tribunal que dans les cas prévus expressément par la loi.

La seconde raison c'est que la Reine ne forme pas partie du gouvernement exécutif ni de la législature des provinces dont elle s'est évidemment retirée d'après l'ensemble de l'acte de l'Amérique Britannique de 1867: que le lieutenant-gouverneur ne la représente pas, mais représente le gouverneur-général, et les ministres du lieutenant-gouverneur ne sont pas représentants de la Reine.

On a dit avec raison que la Reine ne peut céder aucune de ses prérogatives excepté par une loi et en termes exprès. De même et avec plus de raison encore on peut dire que la Reine ne peut cesser d'être la personnification de l'autorité souveraine, dans aucune partie de l'empire sans une loi du parlement impérial ou un traité en termes explicites à cette effet. Car du moment où ce n'est plus elle qui personnifie l'autorité souveraine dans une province quelconque de l'empire, cette province n'est plus partie intégrante de cet empire. Or, si la Reine s'est retirée, par le pacte fédéral, et de la législature et de l'exécutif des provinces, et que les lieutenants-gouverneurs ne sont pas ses représentants, ou n'exercent pas en son nom et à sa place l'autorité qu'ils exercent, ces provinces ne sont plus parties intégrantes de l'empire. Les pouvoirs attribués aux législatures provinciales leur sont attribués à l'exclusion du parlement fédéral; il en est de même du pouvoir exécutif. Un certain nombre de ces pouvoirs sont des droits de souveraineté qui ne peuvent être exercés que par le souverain ou par ses représentants en son nom. Tels sont la législation sur la propriété et le droit civil tout entier, l'administration de la justice, la constitution des tribunaux tant civils que criminels, etc. Ou les lieutenants gouverneurs et les législateurs agissent en leur propre nom (alors ils sont indépendants de Sa Majesté,) ou ils le font au nom de Sa Majesté, et alors ils sont ses représentants.

S'il est juste de dire que Sa Majesté en personne ne forme partie des législatures provinciales et des gouvernements provinciaux, il est également juste de dire qu'elle en fait partie par représentation. Car elle ne peut cesser d'en faire partie personnellement ou par représentation sans cesser d'être souveraine de ces provinces. Les représentants de la Souveraine ne peuvent pas plus être traduits devant les tribunaux qu'elle-même, excepté quand et comme elle le permet. Ce n'est pas par inadvertence que la loi prescrit au lieutenant-gouverneur de choisir les conseillers législatifs et de convoquer les chambres au nom de Sa Majesté. C'est conforme à la nature même de la constitution anglaise, dont les nôtres ne sont que des images.

Mais, dit le demandeur, je suis cité en justice par l'Hon. Chapleau, le procédé commencé contre moi est irrégulier; j'ai droit de le faire déclarer tel; je cite à mon tour ceux qui m'ont appelé en justice et sous les mêmes noms et qualités; je ne fais que continuer le procédé commencé. C'est vrai jusqu'à un certain point; mais il ne faut pas oublier que si l'autorité souveraine a le droit d'agir contre les particuliers de toutes les manières connues pour les individus entre eux, ces derniers ne peuvent agir contre l'autorité souveraine que de la manière permise par celle-ci.

J'emploie intentionnellement les mots autorité souveraine, parce que les mêmes principes prévalent et doivent prévaloir dans tous les États, qu'ils soient monarchiques ou démocratiques.

Le demandeur a soutenu que le Canada n'est pas une fédération, mais une union de provinces en une seule puissance avec de grandes municipalités relevant d'elle. Les termes mêmes du préambule de l'Acte font voir que s'il y a une Union, elle est fédérale: "Considérant que les provinces du Canada, de la Nouvelle-Ecosse et du Nouveau-Brunswick ont exprimé le désir de contracter une union fédérale," etc., Sa Majesté et son parlement ont fait l'Acte de 1867 pour réaliser ce désir. Aussi les provinces ont concédé à la Puissance une grande partie des pouvoirs qui leur appartenaient au moment de l'union. Mais elles ont gardés des pouvoirs qui leur appartiennent à l'exclusion de la Puissance qu'elles ont voulu former et pour laquelle elles ont exprimé le désir de contracter leur union. Le Parlement Impérial n'agit que pour donner effet au contrat, dont les conditions avaient été arrêtées dans les conférences des délégués des provinces. L'Acte impérial n'est que le contrat solennel établissant les conventions arrêtées par les provinces dans les conférences qui ont précédé la Confédération; il doit donc être interprété sans perdre de vue ce fait historique.

L'exception déclinatoire est maintenue avec dépens.

Action dismissed.

R. A. Ramsay, for the plaintiff.

DeBellefeuille & Bonin, for the defendants.

The Legal News.

VOL. VI. JULY 21, 1883. No. 29.

THE AFFIRMATION BILL.

The *Bystander* has taken up a somewhat pretentious position. He seeks to convey the idea that he is writing of those amongst whom he lives, but not as one of them. He seems to criticize from an imaginary elevation. Without great reputation, some unusual talent, striking originality, or all three combined, such an affectation must become instantly ridiculous. Unfortunately the editor of the *Bystander* has none of these protections. People who have thought it worth while to note the operations of our self-constituted mentor's mind, remark that he has learned and unlearned not a little by his American and colonial experiences. His argumentative powers are not overwhelming, and his efforts at persuasion are generally rather repulsive than the reverse.

Among the illustrations of his least captivating peculiarities is his article, in the July number, on the rejection of the English Affirmation Bill. What purports to be argument amounts to this: There are many unbelievers in the world, those who are not unbelievers worship different gods, therefore to a Christian the oath must be regarded with a feeling of abhorrence. In order to avoid the accusation of having misrepresented the reasoning of this apostle of toleration, we give the argument as it appears twice, in different forms, in one short article. "Tens, and perhaps hundreds, of thousands are now wavering between belief and unbelief. To all of these it is proclaimed that religion cannot afford to dispense with a political test, and a political test so utterly tainted and discredited by the lips which have taken it in avowed mockery, or in thinly veiled hypocrisy, that it is difficult to see how any genuine Christian can regard it with any feeling but abhorrence. . . . But the absurdity of the oath stands confessed when we consider that the God to whom the Jews appeal is not the God of the Christian, the Christian God being the universal Father of all, while the Jewish God is the Deity of a race; so that the pious formula on which the religious character of

"the nation and its title to Divine favour are supposed to depend, is in fact a miserable equivocate, and might be taken conscientiously by a believer in Allah, in Vishnu, or in the most degraded divinity of the Pantheon." It would not be easy to compress more errors, nonsense and "equivokes" into a few lines. If it were established that hundreds of thousands were unbelievers, (by that, of course, must be understood, unbelievers in the moral government of the world) it would not in the least affect the question. It is not religion which cannot dispense with a political (?) test, but society which cannot afford to assume that there is no God. Therefore we establish a *legal* test, which is probably what is really meant by the artful use of the word "political." In the repetition of the argument it is again assumed that the religious character of the nation and its title to Divine favour, are supposed to depend on the use of a pious formulary. This is in fact more than a *miserable equivocate*, it is unfair clap-trap. It is not the argument of any one. The use of the oath, as now administered, is to exclude those from the material government of the nation who do not believe in the moral government of the universe, and hence it is, the form of the oath has been changed to admit of its being taken by Roman Catholics and by the Jew, much-dreaded by the *Bystander*.

The attempt to persuade his readers into the idea that the oath should be abolished, (with a view to the next session at Ottawa) is a little more prolix. They are assured that all good men are in favour of the abolition of the test, all bad and unspiritual people, except Mr. Bradlaugh and Mrs. Besant, (who are flung overboard with pitiless severity, as too much for even radical susceptibilities) and perhaps Mr. Morley, and those who are intolerant, are against it. The chief of Christian statesmen, and the "truest followers of Jesus," and Cardinal Newman are in favour of the Affirmation Bill. Lord Randolph Churchill, "who," as we are elegantly told, "displays his appetite for place with as little shame as a dog its hunger for a bone;" the unspiritual Cardinal Manning; the Irish, who are to have no conscience but that which inspires gratitude to Mr. Gladstone for his legislative robberies; Ritualists and Jews, and above all Baron de Worms, who "has not degenerated from the partisans of Caiaphas,"

are opposed to the bill. This tirade finishes with the following curious admission: "The Christians and Jews of the Stock Exchange no doubt worship at heart the same God, and alike regard the test as a protection of the strong box." It seems that if the test were nothing more than a protection to property, it would be a sufficient reason to preserve it.

The motives for the extraordinary changes in the political views of Mr. Gladstone, "the chief Christian statesman" of the *Bystander*, have been exemplified too recently by the indiscreet publication of his correspondence with Bishop Wilberforce, to leave much force in an appeal to the moral weight of his expressed opinions. Who "the truest followers of Jesus" are, we are left to guess—haply Mr. John Bright and Lord Coleridge. The former of these religious guides told us a few years ago that "be it in town or be it in the country, you will find the church is never a centre of political light, but of political darkness." And the latter owed some of his preferment to his joining Mr. Gladstone in despoiling the Irish branch of the Church of which he is a member. This great jurist, "whose religious character and seal in the church's cause, (i.e. the cause of the centre of political darkness, according to Mr. Bright) are above question," is incidentally commended for putting "a rational construction on the dictum that Christianity is a part of the law of the land." We are then told in what sense the *Bystander* thinks it was commonly understood, until we were suddenly enlightened by a ruling of the Lord Chief Justice. He (*Bystander*) says "that dictum would be a restraint not only on the utterances of the free thinker, but on all theological discussion; for the Christianity which is a part of the law, must be the Christianity by law established, and thus no one could be permitted to question any one of the myriad propositions of theology embraced in the Articles, Homilies and Prayer Book of the Church of England. But the Lord Chief Justice has ruled that fair argument, though it may be directed against Christianity, is free, and that nothing is prohibited except those outrages upon the religious feelings of the community, which are breaches, not of orthodoxy, but of public decency."

The legal discoveries of the Lord Chief Justice and the *Bystander* are worthy of serious consideration; but they are not precisely what they are represented to be in the article before us. The dictum was not commonly understood as is above set forth. It was the Divinity of Christ that was protected by the dictum, not "all the myriad of propositions," etc. This was a tangible rule, before the admission of Jews to Parliament. Since, it is logically untenable. The ruling of Lord Coleridge is in the last degree arbitrary and illogical. It lays down as a rule what has no metes or boundaries, and is really no more than a tub to the whale of popular prejudice, as Lord Coleridge very well knows. If reviling Christ, denouncing his miracles as impostures, and denying his Divinity, be not "a breach of orthodoxy," it is dishonest in an educated man to say he pretends to think it is "a breach of decency." If Christ was not God, it is a perfectly fair proposition to maintain that he was an impostor.

It is rather hard on so pure-blooded a liberal as Mr. Morley, to have a friendly hand declare that the oath has been utterly tainted and discredited by the lips which have taken it, in avowed mockery, or in veiled hypocrisy. We should be glad to know what Mr. Morley thinks of the dictum of the Lord Chief Justice in the case of the "Free-thinker," and of the *Bystander's* estimate of that valuable addition to the doctrine of the common law.

It is unnecessary to pursue further the consideration of the *Bysander's* crudities and appeals to small jealousies and popular passions, which its editor assumes for a purpose as unscrupulously as he has misrepresented the argument in favour of the legal test. There is, however, one misstatement so gross as to deserve special mention. He declares, without qualification of any kind, that Cardinal Newman was in favour of the Affirmation Bill. Here is what the Cardinal says, on the occasion referred to by the *Bystander*, writing to Mr. F. W. Chesson, on the 8th May last:

"BIRMINGHAM, May 8, 1883.

"Dear Sir,—I do not know how to answer your question without using more words than I like to trouble you with. I feel myself to be so little of a judge on political or even social questions, and religious ques-

tions so seldom come before us, that I rarely feel it a duty to form and to express an opinion on any subject of a public nature. I cannot consider that the Affirmation Bill involves a religious principle; for, as I had occasion to observe in print more than thirty years ago, what the political and social world means by the word "God" is too often not the Christian God, the Jewish, or the Mahomedan—not a personal God, but an unknown God: as little what Christians mean by God as the fate, or chance, or *anima mundi* of a Greek philosopher. Hence, it as little concerns religion whether Mr. Bradlaugh swears by no God with the Government, or swears by an impersonal, or material, or abstract and ideal something or other, which is all that is secured to us by the Opposition. Neither Mr. Gladstone nor Sir Stafford Northcote excluded from Parliament what religion means by an "atheist." Accordingly it is only half my meaning if I am made to say that "I do not approve, in any sense of the word, of the Affirmation Bill." I neither approve nor disapprove. I express no opinion upon it, and that, first, because I do not commonly enter upon political questions; and next, because, looking at the Bill on its own merits, I think nothing is lost to religion by its passing, and nothing gained by its being rejected.

"I am, dear sir, your faithful servant,

"JOHN H. CARDINAL NEWMAN."

What Cardinal Newman says then, by this drivell, is, that he does not enter on the political question, and that from a religious point of view he is neither in favor of the Bill nor against it, because it does not exclude atheists and those who do not believe in a personal God. Not being a theologian, it would be impertinent to say that the Cardinal's view does not accord with the doctrine of the Church of his adoption, or of that in which he was brought up; but certainly in the practice of England and of France, the test has not usually been the belief in a personal God, a Christian God, the Jewish or the Mahomedan God, but belief in responsibility in a future state.

The readers of the *Bystander* will do well, before allowing their minds to be prejudiced by the fallacies of its periods, to consider two things with regard to an Affirmation Bill as a

test for the admission of members to Parliament; first, that all the arguments now used against the test, may with equal force be used against the oath as a sanction for judicial proceedings; second, that the question is a practical one, affecting society, not religion, and that if it be a protection to society, it is no more intolerant to uphold the test than to execute a political assassin who is pleased to justify his crime. R.

QUEEN'S COUNSEL.

The following appointments to be Queen's Counsel have been made by the Governor General:—

Ottawa, 26th June, 1883.

PROVINCE OF QUEBEC.

William W. Robertson, Esquire,	Montreal.
William White,	Sherbrooke.
Hubert C. Cabana,	"
George O. Doak,	Coaticook.

28th June, 1883.

PROVINCE OF ONTARIO.

Valentine MacKenzie, Esquire,	Brantford.
Richard Bayley,	London.
Salter Jehoshaphat Vankoughnet, Esq.,	Toronto.
James Tilt,	"
William Purvis Rochford Street,	London.
George Milnes Macdonnell,	Kingston.
John Bain,	Toronto.
Frederick Drew Barwick,	"
Hugh McKenzie Wilson,	Brantford.
Robert C. Smyth,	"
James Joseph Foy,	Toronto.
Walter Gibson P. Cassells,	"
Norman Fitzherbert Paterson,	Port Perry.
Thomas Horace MacGuire,	Kingston.
Henry J. Scott,	Toronto.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, July 9, 1883.

Before TORRANCE, J.

CAMPBELL, Atty Gen., *pro Regina v. BATE.*

Patent of Invention—Default to file model.

The omission to file a model of an invention for which letters patent are applied for, is fatal to the validity of the patent issued without such model, and without any dispensation by the Commissioner of Patents from filing a model.

This was the merits of an information by the Attorney-General of Canada, demanding the issue of a writ of *scire facias*, summoning

the defendant to show cause why a patent of invention and the extensions thereof should not be set aside and declared null.

On the 11th January, 1877, a patent of invention issued from the office of the Commissioner of Patents for Canada, granting to John Jones Bate the exclusive right of manufacturing and vending an invention as a system of ventilation and refrigeration for five years from that date, and on the 12th December, 1881, the patent was extended for another five years, and on the 13th December it was extended for another five years. When granted, no model had been filed with the Commissioner, and he had not dispensed with the filing. But he refused to deliver the patent to the applicant until the model had been filed. The model was filed on the 18th June, 1878, more than a year and five months after the granting, issue, and registration of the patent. The information complained of this omission, and the defendant answered that the default to file a model was not fatal to the validity of the patent, and further that the subsequent compliance would cure any defect and make the patent valid from its date, or, at any rate, from the date of the compliance.

PER CURIAM. By 35 Vic. cap. 26, s. 15, (Canada) the applicant shall deliver to the Commissioner, unless specially dispensed from so doing for some good reason, a neat working model of his invention. By Sec. 6, he is entitled to a patent on compliance with the requirements of the Act. The authorities cited at the Bar and in the elaborate factum of the petitioner, satisfy me that the Act has not been complied with, and therefore the conclusions of the information should be granted.

Judgment for petitioner.

Archibald & McCormick, for Attorney General.
Church, Chapleau, Hall & Atwater, for defendant.

SUPERIOR COURT.

SHERBROOKE, June 26, 1883.

Before BROOKS, J.

WOODARD V. BUTTERFIELD.

Damages—Inducing a person to cross the boundary line in order to have him arrested for a pretended debt.

Held, that the defendant was liable to the plaintiff in damages for having induced the plaintiff to

go across the international line, and for causing him to be arrested in Vermont for an alleged debt, which, it appeared, did not exist.

The plaintiff resides in the Township of Melbourne, in the district of Saint Francis. The defendant has a machine shop at Rock Island, in Canada, close to the boundary line. The plaintiff and defendant had some business transactions together, and each of them claimed that the balance was in his favor. Under these circumstances the plaintiff wrote defendant demanding a settlement and threatening suit. The defendant replied that if the plaintiff would go to Rock Island, he would send him a railway ticket to that place and pay his expenses, in order that they might arrive at a settlement of their account. The plaintiff accepted the offer and went to the defendant's shop at Rock Island, where he was told that he would find the defendant at the hotel at Derby Line in Vermont. The plaintiff walked across the line to the hotel and was there arrested at the instance of the defendant. After the trial had been postponed and put off a number of times upon the application of the defendant, judgment was entered up by the Justice Court at Derby Line in favor of the present plaintiff for the amount of the balance claimed by him, namely, about forty dollars.

The plaintiff now brought an action in the Superior Court, district of Saint Francis, claiming damages for false arrest. The defendant is described in the writ as of Rock Island, and was personally served at Rock Island in this province, but the evidence would go to show that he boards at the hotel at Derby Line.

PER CURIAM. It is clearly established in this case that the plaintiff was induced to go across the line by the defendant, with the object of having him there arrested. It is proved that on the night previous the defendant had called upon the deputy-sheriff "to be on hand at the hotel in the morning, as he had a job for him," and defendant pointed out plaintiff to the deputy-sheriff in the morning. The proceedings before the Justice of the Peace were continued from day to day at the instance of the defendant, and the plaintiff was subjected to considerable cost and annoyance.

Considerable evidence has been given in this case by legal gentlemen from Vermont, as to the law there in regard to the arrest of for-

sign debtors who may be found in the State; and some attempt has been made to show that in Vermont it is considered less detrimental to arrest the body than it is to attach the property. This idea cannot, however, be allowed to prevail here. Whatever may be the law of Vermont as to the right of arrest, it is the duty of the Courts here to protect the citizens of this country in a case so outrageous as the present one. And one of the lawyers who was examined on behalf of the defendant has admitted that even under the law of Vermont an action of damages would lie for an arrest, showing that artifice had been used to entice a party across the line in order to have him arrested.

In this case I think that substantial damages ought to be given. The defendant is condemned to pay the plaintiff \$250 and costs.

Ives, Brown & French for plaintiff.

H. M. Hovey for defendant.

Wm. White, Counsel for defendant.

COURT OF REVIEW.

MONTREAL, June 28, 1883.

Before SICOTTE, J., DOHERTY, J., and RAINVILLE, J.

THE MERCHANTS BANK OF CANADA v. THE MONTREAL, PORTLAND & BOSTON RY. CO., and W. J. INGRAM, *mis en cause*, and DE O. VERRETTE, *Intervenant par rep. d'instance*.

Execution—Guardian.

Held, 1.—A guardian of goods seized in execution is not guilty of contempt of court for having refused to comply with an interlocutory judgment appointing a new guardian, and ordering him to deliver the goods seized to such new guardian, when before service upon him of such judgment the first guardian has been served with a number of *saisies-arreêts* after judgment attaching these goods in his hands.

2.—The seizure of the goods of a defendant by process of *saisie-arreêt* in the hands of the judicial guardian in whose custody they are, is valid.

The Merchants Bank, being judgment creditors of the Montreal, Portland & Boston Ry. Co., had seized in execution a number of bonds belonging to that Company, and the seizing bailiff had appointed Mr. W. J. Ingram (then Assistant General Manager of the Bank) to the guardianship of these bonds. Shortly after this the defendants obtained an order substituting

Mr. McIntyre as guardian, and requiring Mr. Ingram to deliver the bonds over to the new guardian. Before this order had been obtained, however, Mr. Ingram had been served with a number of *saisies-arreêts* after judgment issued at the instance of divers creditors of the Railway Company, ordering him in the usual terms not to dispossess himself of these bonds until the further order of the Court respecting the same. In consequence of these conflicting orders, the *mis en cause* refused to give up the bonds to the new guardian when called upon to do so, until the Court should have rendered a judgment on the *saisies-arreêts* served upon him.

Thereupon the defendants petitioned for a rule to have him declared in contempt of Court for refusing to obey the order first mentioned. Before the final hearing on this petition, one of the seizing creditors intervened to prevent the rendering of a judgment ordering the *mis en cause* to part with the bonds, on the ground that the seizing creditors had acquired rights against the first guardian, which would be lost if the bonds were delivered over to the second.

At the hearing it was contended by the defendants in support of their petition, 1st. That the honorable judge who gave the order for a change of guardian had adjudicated upon the *saisies-arreêts* which were then in the record, and that his order had been given notwithstanding their existence; 2nd. That the *saisies-arreêts* pleaded by the *Mis en cause* and the Intervenant were null and void, because the effects seized were always the property of the defendants, and not at any time that of the Garnishee who had no legal quality of third party, and whose possession was merely that of an officer of the Court, and whatever was seized was really in the hands of justice and could not be attached by *saisie-arreêt*. These seizures being no better than waste paper, the Intervenant had no *status* in the case at all, and as for the *Mis en cause* he should be declared in contempt of Court for choosing to obey the order contained in these worthless writs of attachment rather than the judgment served upon him.

The first contention of the defendants was not sustained by the record, which contained nothing to show that the judge who rendered the judgment changing the guardian, had had the attachments brought under his notice, and his judgment contained no reference to them.

On the second point the Intervenant maintained that the seizure of the bonds in the hands of Ingram, who was in physical possession of them was perfectly legal and valid.

On behalf of the *Mis en cause*, it was submitted that the question of the validity or invalidity of these attachments was not a question for him to decide. Served on the one hand with a judgment ordering him to deliver these bonds to another guardian, and on the other hand with several writs requiring him not to dispossess himself of them until further ordered, he adopted the only prudent course, namely, to await the decision of the Court. Such conduct on the part of a guardian could not be construed into a contempt of Court.

On the 31st day of May, 1883, Torrance, J., rendered a judgment declaring the answers of the *Mis en cause* good and valid, dismissing the Petition of the defendants, and maintaining the Intervention.

The Court of Review unanimously confirmed this judgment.

J. O'Halloran, Q. C., for Plaintiffs.

M. S. Lonergan, for Defendants.

Wotherspoon & Lafleur, for Mis en cause.

Judah & Branchaud, for Intervenant.

UNITED STATES DECISIONS.

Maritime Law—Demurrage—Detention of Boat by Business at Wharves.—Where the voyage described in the charter-party was a voyage "to San Francisco, or as near thereto as the vessel can safely get," and the cargo was to be delivered "along-side of any craft, steamer, floating depot, wharf, or pier, as may be directed by the consignees," and the consignees named a wharf to which, by reason of its crowded state, the vessel could not enter for a time greater than that within which, by other provisions in the charter-party, the discharge was to be effected after it had been commenced, *held*, that the charterer was liable for the detention. It appears to be well settled in England, that where, by the charter-party, the ship is to be brought to a particular dock, or as near thereto as she can safely get, and she is prevented from getting to her primary destination by any permanent obstacle other than an accident of navigation, the ship-owner is entitled to damages for the detention by reason of the charterer's refusal to receive the cargo at the alternative

place of delivery, although the obstacle which prevented her from getting into the docks (*viz.*, their crowded state) was not an obstacle endangering her safety. *Nelson v. Dahl*, 12 L. R., Ch. Div. 568, 583; *Ford v. Cotesworth*, L. R., 4 Q. B. 127; *Cross v. Beard*, 26 N. Y. 85. It is also settled that where the contract specifies a certain number of days for loading and unloading, and provides that for any detention beyond the lay days demurrage is to be paid at a fixed rate per day, the shipper is held very strictly to its terms; neither a municipal regulation of the port prohibiting the unloading for a limited period, nor delay occasioned by frost, tempest, or by the crowded state of the docks, will relieve him from the payment of demurrage. *Randall v. Lynch*, 2 Camp. 352. But where no particular period for loading or unloading is stipulated in the contract, the freighter is bound to receive the cargo within a reasonable time, and for the breach of his implied contract to that effect he is liable in damages. Thus, where the freighter was allowed "the usual and customary time" to unload the ship in her port of discharge, and the crowded state of the docks delayed the discharge, Lord Ellenborough held that as the evidence showed that it was usual and customary in the port of London for ships laden with wines to take their berths in the dock by rotation and to discharge into bonded warehouses, there was no breach of the implied covenant to discharge in the usual and customary time. *Rodgers v. Forrester*, 2 Camp. 483. In a subsequent case where the charter-party was silent as to the time for unloading, it was held by Sir James Mansfield that "the law could only raise an implied promise to do what was usually stipulated for by express covenant, *viz.*, to discharge the ship in the usual and customary time for unloading such a cargo, and that had been rightly held to be the time within which a vessel can be unloaded in her turn, into the bonded warehouses." *Burmester v. Hodgson*, 2 Camp. 488. The case of *Davis v. Wallace*, 3 Cliff. 123, closely resembles the case at bar. The vessel was detained at the wharf designated by the charterer four days,—three because the berth was occupied, and one by lack of teams. The charterer was held liable for the detention. But the charter-party in that case provided for "*quick dispatch*" at the

port of delivery; and this contract, it was held, "overrides any customary mode of discharging vessels by which they are to take their turn at the wharf. The naming of a wharf is a warranty that a berth can be had there." *Thacher v. Boston Gas-light Co.*; 2 Low. 362; *Keene v. Audenreid*, 5 Ben. 535; *Bjorquist v. Steel Rails*, 3 Fed. Rep. 717. (U.S. District Court, California, January, 1883.) *Williams v. Theobald*, 15 Federal Reporter.

Common Carriers.—At common law, a common carrier is an insurer of the goods which he undertakes to carry; and a contract of exemption from liability as insurer for loss by fire, etc., must, like other contracts, be founded upon some consideration.—*Taylor v. Little Rock M. & T. R. R. Co.*; Supreme Court of Ark., 39 Ark.

Personal Property inadvertently left on premises.—The owner of a tannery, when removing his hides, omitted to remove all. The tannery was sold, and many years after, the plaintiff, while labouring for the defendant in erecting a factory on the premises, discovered the hides so left. *Held*, that the owner of the hides or his representative, had not lost their title to the same; that the finder acquired no title to the same, they being neither lost, abandoned, nor derelict, nor treasure trove.—*Livermore v. White*, Supreme Court of Me. 74 Me.

Indictment—Describing stolen property.—Under an indictment for stealing chickens, a conviction upon proof of stealing hens will be sustained. Louisiana Supreme Court; *State v. Bassett*, 15 Rep.; May 9.

RECENT ENGLISH DECISIONS.

Agency—Privileged statement of agent to principal not admissible against principal.—A statement made by an agent to his principal cannot be used against the latter by a third party; nor where the agent is the common agent of a body of persons, such as the chairman of a company, can a statement by him to the members of the body, *s. g.*, at a statutory meeting, be used against the body by one of its own members, *s. g.*, a shareholder. A. applied to have his name removed from the list of members of a company on the ground that he had been induced to take shares by false representations contained in a prospectus. At the hearing of the application he sought to use, in support of his contention as

to the falsity of the prospectus, a statement made by the chairman of the company (after the issue of the prospectus) in course of explaining the company's affairs at a statutory meeting. *Held*, that he could not be allowed to do so. *Meux's Executors' case*, 2 De G. M. & G. 522, distinguished. Ch. D., Jan. 22, 1883. *Matter of Devala Gold Mining Co.* Opinion by Fry, J. (48 L. T. Rep., N. S. 259.)

Evidence—Parol to explain writing—False representation.—(1) S. signed a written contract with R. to purchase a brickfield for a "£17,000," to be paid as follows: £16,000, in cash, and £1000, in freehold equities, to pay on the £1,000, 12 per cent. per annum. Before signing S. had made out and given to R. a list of freehold houses, in which he was entitled to the equity of redemption, but this document was not referred to in the contract. *Held*, that such list was permissible by way of parol evidence to explain the meaning of freehold equities in the contract (2) In the negotiations S. asked R. whether he had ever put the property into the hands of an agent to sell for less money than he was then asking, saying that he fancied, as the fact was, that it must be the same as had been offered to him for less. R. falsely answered "No." *Held*, that this was such a material misrepresentation as to prevent the court enforcing the contract in an action brought by R. Ch. D., February 13, 1883. *Roots v. Snelling*. Opinion by Pollock, B. (48 L. T. Rep. N. S. 216.)

A DOUBTFUL COMPLIMENT.

The London *Law Times* makes rather a bull, and at the same time betrays the decline of the "noble profession of the law" when, in speaking of the complimentary dinner to Mr. J. P. Benjamin on his retirement, it says: "As the bar becomes poorer—and as a body it is becoming poorer—the impression grows that complimentary dinners to successful men on retiring and on promotion should not be given by the bar; but that if events of this kind are to be celebrated, this should be done by those who have made their fortunes and value the congratulations of their friends."

The bull consists in assuming that the banquet given by the successful man would be a "complimentary" banquet to him; and moreover it is painful to think that the members of

the "noble profession" stand so much in need of a dinner.

The *Chicago Legal News* unconsciously falls into the same pit when it says: "We think there is much in the suggestion of our English contemporary, and that the lawyer who has had a successful professional life, and amassed a fortune, and is about to retire from the bar, may with great propriety give a dinner to his professional friends and receive their congratulations. Let the dinner come from the man who has made his wealth at the profession and not from the poor members of the bar." This is sufficiently surprising from our esteemed Western contemporary, but what shall we say of the *Albany Law Journal*, which cries: "We are of the same opinion. This sort of affairs (?) should not be conducted on the principle of a Jersey treat, where every man pays for himself, but the recipient should foot the bills." The query which suggests itself to us is where the compliment to Mr. Benjamin would come in if Mr. Benjamin "footed the bill?" Also by whom should the first move towards the entertainment be made? By the recipient of the compliment who is expected to foot the bill, or by the bar, expecting to be fed gratuitously and confer a compliment simultaneously?

GENERAL NOTES.

Sir Albert J. Smith died June 30, aged 59. He was born in Westmoreland County, N.B., in 1824; admitted to the Bar in February, 1847. In 1852 he entered public life as representative of Westmoreland in the New Brunswick Assembly, which position he continued to hold until Confederation, when he was returned for the House of Commons. He entered the Mackenzie Ministry as Minister of Marine and Fisheries, and held this office until the defeat of the Mackenzie Government in 1878. In 1877 he represented Canada before the Fisheries Commission, which met at Halifax under the Treaty of Washington. He lost his seat in the general elections of 1882.

An assessor in the county of Welland has been committed to gaol for six months and fined \$200 for assessing his own property at a sum much below its value. The case was one of much interest at Port Colborne, where it arose, from the fact that Samuel Hopkins, the accused, is a man of considerable wealth, and consequently of some social position in the community. The offence was committed in 1881, and it has been eighteen months before the courts. One of the pleas on behalf of the prisoner was that other assessors in the county were guilty of similar irregularities. It is to be hoped that this is an exaggeration. At all events it did not excuse the offence, nor did it lessen

the penalty, the judge being of the opinion that the case might be made a warning to other officers.

The defendants were prosecuted for larceny. They had received permission to pick up bricks that were left of a steam saw-mill, belonging to the firm of Eisler & Sons, which had been destroyed by high water. Under the sand and rubbish they found parts of the saw, of the value 15 fl. and appropriated the same to themselves. The court below found them not guilty, and the public prosecutor appealed. The Court of Cassation rejected the appeal for the following reasons: It has been found as a matter of fact that the articles mentioned had remained buried under the rubbish for one and a half years after the mill was destroyed, without the knowledge of the firm. The question then is not of articles misplaced, of which the owner knows that they are within a certain locality, to which he has access, but does not know exactly where; nor of articles forgotten, which were left at a strange place, without the owner's losing the fact from his mind that they were so left: we must rather apply to this case the idea of articles lost, which applies wherever the place, in which the articles are, is not, or is no longer, known to the last owner, or has become inaccessible to him in a permanent manner. From this condition of things it follows indeed, that the possibility to exercise an actual control over the articles has been removed, and therefore possession by the firm does not exist, but again from that fact it cannot be concluded that the firm has given up its property in the articles. There is no more question then of larceny, than of lawful occupancy; the offence is not concealment of articles found.—*Vienna Juristische Blätter*.

Mr. Bright, in a recently published letter, says: "A man may have a legal wife in the colonies, and another legal wife in England. He may bring his Canadian legal wife to England, where, when she touches our shores, she is not a legal wife, and where her children born here are not legitimate. If you can justify this I will not argue with you." Upon this the *London Law Journal* remarks: "The statement may or may not be justified, on the ground that we are not bound to alter our laws to suit the taste of those who visit us, but it may safely be traversed. If a Canadian, married to a deceased wife's sister in Canada, were to come to England, his wife would not cease to be his legal wife, and his children born here would be legitimate. In fact, the legality of a man's marriage does not depend on the place where he happens to be, or the legitimacy of his children on the place where they are born. It depends on his domicile at the time of his marriage. A man is not married and unmarried as he crosses a frontier." "When a politician puts his views on legal grounds, he should be sure his grounds are legal." And yet the House of Lords held, in *Brook v. Brook*, where an Englishman met and married his deceased wife's sister in Denmark, that the marriage although not forbidden in Denmark was invalid in England. And so, although Mr. Bright's statement was too broad, yet it would have been correct if he imagined a Londoner marrying his deceased wife's sister in Canada. That makes a case about as bad for the consistency of British laws.—*Albany Law Journal*.

The Legal News.

VOL. VI. JULY 28, 1883. No. 30.

LORD COLERIDGE'S VISIT.

The Chief Justice, it is understood, has left in the hands of the N. Y. State Bar Association the arrangement of his appointments and acceptances. The Committee of arrangements have already accepted on his behalf the invitation of the Governor of Massachusetts for the 4th and 5th of September, and from Boston the party go directly either to Fredericton or Quebec, that being a point left to be decided by Lord Coleridge's old friend the Lord Bishop of Fredericton. From Quebec they expect to go to Montreal, Ottawa, and Toronto, where the bench and bar have tendered a banquet. The party are expected to reach Toronto somewhere between the 11th and 15th of September. The party accompanying his Lordship to America, consist of his son, as his secretary, with Sir James Hannen and Charles Russell, M. P. for Dundalk, Ireland. They are expected to arrive by White Star S. S. Celtic about 23rd August.

NUISANCE.

The members of the "Salvation Army" have come into conflict with the police in London, Ont., and thus far have fared worse than they did in England (5 L. N. 265). A youth named Ward, a drummer in the Army, was brought before the Police Magistrate, charged with beating a drum on the public street and making an unusual noise, to the disturbance of the people. Several witnesses testified to the drumming, after which counsel addressed the Magistrate. Mr. Macdonald, for the defendant, admitted the beating of the drum; he claimed that it could not be brought under the scope of the by-law, as nearly every band that went through the city had drums and were making a noise, and this beating of drums could not be tortured into a breach of the by-law. Mr. R. M. Meredith for the city, maintained that the noise was an unusual one, and quoted from the statutes to show that the city had authority to prevent this noise as a nuisance. He asked that the army should be required to give sureties not to repeat the offence. His Worship expressed the opin-

ion that the case came within the by-law and that it was an unusual noise. The beating of a drum in a military procession was not unusual, but the beating of drums was an unusual noise to call people to church. He did not propose to impose a heavy fine, and would, therefore, make it in this instance \$5 or one week in gaol, hoping the noise would be stopped in future. It clearly came within the meaning of the by-law. He had a great respect for these people in many ways, but he thought this was unusual.

The trial terminated as follows:

Capt. SHIRLEY—"My brother can't pay it; it is for Jesus, and we can't pay."

Chief WILLIAMS—"Oh, that is all right. The fine will be collected by execution after four days, and in default he will go to gaol for a week."

Capt. SHIRLEY—"Thank the Lord." (To the prisoner) "Jim, don't you pay it, if you have to rot in gaol."

At a subsequent date similar proceedings were taken against other members of the Army, and "Capt." Shirley was fined \$5 or one day in gaol, and Addie Ann Parson \$10 or one week in gaol, for playing flutes, drums and trumpets on the streets contrary to the by-law prohibiting unusual noises.

ESCHEAT.

The Judicial Committee of the Privy Council have given judgment in the *Mercer* case in favour of the Province of Ontario, thus settling the important principle that it is the Provincial and not the Dominion Government which succeeds to the estates of persons dying intestate and without heirs. The case arose out of the death in 1871 of the late Andrew Mercer, who died intestate and without heirs, and left a large amount of real estate. The property was taken possession of by the late Attorney-General Macdonald on behalf of the Province, but every facility was, during an interval of several years, afforded to claimants in Canada and England to make good their allegations of relationship to the deceased. Amongst them was one who claimed to be his son, but who was unable to establish his legitimacy to the satisfaction of the Courts.

In the absence of heirs-at-law the real property left by Mr. Mercer at his death escheated to the Crown, and in 1878 application was made by the Attorney-General of Ontario, representing the Crown, to the Court of Chancery, for an

order putting him in possession. Mr. Andrew F. Mercer and the other defendants who had taken possession of the lands, disputed the title of the Province and demurred to the action, and the demurrer was overruled by the Vice-Chancellor. The decision of the latter was appealed against on several grounds, the one of greatest public interest being the plea that if Mr. Mercer had really died intestate and without heirs, and if his property had on that account really escheated to the Crown, it should revert to the Dominion of Canada and not to the Province of Ontario. This plea was rejected by the Ontario Court of Appeal, which decided unanimously that real property escheating to the Crown should revert to the Province and not to the Dominion. Previous to the date of this judgment the Quebec Court of Queen's Bench had unanimously decided the same point in the same way. (See *Church v. Blake*, 2 Q.L.R. 236.) The judges who decided the Mercer case in appeal were the late C. J. Moss and Justices Burton, Patterson and Morrison.

The Mercer case was carried to the Supreme Court on appeal from the decision of the Ontario Court of Appeal, the very first ground being the one already referred to, that "lands in the Province of Ontario escheat to Her Majesty representing the Dominion in right of her royal prerogative," and that the Dominion Government, and not the Ontario Government, should take possession. In a very elaborate judgment, Chief Justice Ritchie went thoroughly into the whole question of prerogative, holding that the lieutenant-governor of a province, for certain purposes, represents the Queen, and that as the Crown lands were at Confederation assigned to provincial management and control, such of these lands as might afterwards escheat to the Crown should remain under the same management and control. Mr. Justice Strong concurred with the Chief Justice, but as Justices Henry, Fournier, Taschereau and Gwynne took a different view, the judgment of the Ontario Court of Appeal was reversed.

The Ontario Government carried the case on appeal to the Judicial Committee of the Privy Council, and it was argued before that Court on the 7th instant. Judgment has now been given, reversing the decision of the Supreme Court of the Dominion, affirming that of the Ontario Court of Appeal, and declaring by implication

that escheated lands in any province revert to the provincial and not to the Dominion Government. A great deal of interest was taken during the progress of the case in the Canadian Courts by the Government of Quebec, which requested and was allowed the privilege of being represented by counsel during the argument before the Supreme Court. The case will be found in the 5th Sup. Ct. Rep. Canada, pp. 538-712.

NOTES OF CASES.

SUPERIOR COURT.

SWEETSBURGH, July 6, 1883.

Before BUCHANAN, J.

DUGRENIER v. DUGRENIER.

Nullity of contract extorted by threats—Fear and violence—Acquiescence.

An obligation extorted by violence is null, and payments made to and received by the party seeking for the nullity of an obligation by suit on such grounds is not an acquiescence.

The defendant mortgaged certain property to the plaintiff, the amount of which was to be paid in butter tubs in monthly payments. Shortly afterwards defendant sold the property to one J. B. Fregeau with *faculté de réméré*, but making no mention of plaintiff's mortgage. Fregeau discovering this, with the aid of defendant and his son Louis, to compel plaintiff to give him priority upon the land—threatened to prosecute plaintiff criminally for having forged the name of defendant's son Louis to a promissory note. Yielding to this threat, which was made under circumstances and by the aid of accessories calculated to more effectually intimidate him, the plaintiff signed the discharge and accepted a new obligation from defendant by which the monthly payments of butter tubs were to continue until the claim was extinguished.

Within a few days thereafter plaintiff sued to resiliate the discharge and obligation on the alleged ground of violence, by which his consent thereto had been extorted. By one of the defendant's pleas, and the only one on which he relied, he set up certain amounts in compensation and payment, alleging that the reception

of those amounts by plaintiff was an acquiescence and confirmation of the discharge.

The Court held that according to the proof the consent of plaintiff was extorted by violence and fear; and as to the question whether "the payments received by plaintiff constituted a legal confirmation of the voidable acts," made the following observations:—"The payments made are established by the plaintiff when examined as a witness by defendant. He is asked, when did defendant make the first payment of tute on the obligation impugned. 'Answer. In the month of November, 1879.' This was subsequent to the bringing of the suit, and there are payments made afterwards and accepted by plaintiff. I do not examine closely the extent of the proof of the sums set up in compensation, for compensation cannot have the effect of acquiescence which in certain circumstances payment has. An entire payment, of course, would extinguish plaintiff's interest and the suit; but it is not contended in the pleadings that the entire amount is extinguished, for by his plea the defendant says that he is ready and willing to continue his payments, clearly negating the idea that the plaintiff was without interest in the suit as having been paid. Did the acceptance of those payments cover the nullity in the obligation and confirm it? By Art. 1214 of our Code it is said the act of ratification or confirmation of an obligation which is voidable does not make proof unless it expresses the substance of the obligation, the cause of its being voidable and the intention to cover the nullity. This evidently contemplates written proof, and says nothing as to acts done from which ratification might be implied. The absence of legislation on that point is to be noticed when we consider this article in connection with Art. 1338 of the Code Napoléon and which is referred to by the codifiers in Art. 1214. The article of the Code Napoléon reads as follows: "L'acte de confirmation ou ratification d'une obligation contre laquelle la loi admet l'action en nullité ou en rescision, n'est valable que lorsqu'on y trouve la substance de cette obligation, la mention du motif de l'action en rescision et l'intention de réparer le vice sur lequel cette action est fondée.

A défaut d'acte de confirmation ou ratification il suffit que l'obligation soit exécutée volontairement après l'époque à laquelle l'obliga-

tion pouvait être valablement confirmée ou ratifiée." This last paragraph has not been adopted in our Code.

Pothier on Obligations, Vol. 1, No. 21, says: "Que si, depuis que la violence a cessé, il a approuvé le contrat soit expressément soit tacitement en laissant passer le temps de la restitution qui est de dix ans depuis que la violence a cessé, le vice du contrat est purgé." So that under this authority there must be express recognition to be valid.

Story on Contracts at Sec. 404, says, "a contract made under duress may be ratified either by an express confirmation or by acts from which a ratification will be *distinctly* implied," the word "distinctly" evidently showing that the recognition must, to some extent, be express, and thus agreeing with our law on the subject.

The payments accepted of by plaintiff cannot be said in any sense to mean *expressly* or *distinctly* that the plaintiff ratified the impugned acts and intended to renounce what he was actually carrying on at the time, his action *en nullité*. These acts certainly must have the qualities and character required by Art. 1214 in a written act, and must, as therein is required, be express or lead to the absolute presumption of the intention to cover the nullity. These payments when received were not accompanied by any declaration by plaintiff of such intention, and there is no absolute presumption leading that way, the presumption in fact being that he was only taking what was owing to him. See Laurent, Vol. 18, p. 633. The contract here may have been in part materially executed by the payments, but I see no facts revealing any certain or express intention to cover the nullities, and the reception of the partial payments is not in any manner inconsistent with or destructive of the plaintiff's persistence in his right of rescission. I have, therefore, come to the conclusion that plaintiff's action should be maintained.

Judgment for plaintiff.

T. Amyrauld, for plaintiff.

Jno. P. Noyes, for defendant.

SUPERIOR COURT.

MONTREAL, July 5, 1883.

*Before TORRANCE, J.*THE HOUELAGA MUTUAL FIRE INSURANCE CO. V.
LEFEBVRE.*Mutual Insurance—Liability of members—Compensation.**Persons who become members of a mutual insurance company and pay premiums under 40 Vict. c. 72, sec. 35, are liable as members for assessment for losses.**Arrears of Directors' fees cannot be offered in compensation of an assessment to meet specific losses.*

The demand was to recover the sum of \$139,750 as assessments made upon the defendant as member of the company under policies numbered 386, 501, 918.

The defendant pleaded that he was not liable as member, having insured on the cash principle, and not on the principle of mutuality. 2nd. That there had been no losses. 3rd. That policy 354 had been transferred by him to Jeremiah and Patrick Foley with consent of the company on the 15th May, 1877, and policy 501 had been transferred by him to Adolphe Roy with its consent on the 2nd August, 1878, and he could not be liable for losses subsequent to these dates on these policies. 4th. That the company owed him \$112.50 for director's fees, and there was compensation for so much.

PER CURIAM. The plaintiffs were incorporated under C.S.L.C. cap. 68, and section 6 says that the insured shall be members. Sec. 24 provides for assessments on members for losses. The Act 40 Vict., c. 72, changes the name of the corporation (sec. 1), but says that it shall not be a new corporation. Sec. 3 provides for the admission of persons insured who shall have the same rights and be subject to the same liabilities as other members. Sec. 35 provides for cash premiums.

There is nothing to limit or terminate the liabilities of persons insured. These are liable as members. Lefebvre was insured when the loss occurred for which the assessment is made, and he must pay his share.

As to the plea of compensation, the counsel for plaintiff contends that the Directors' instructions to the Secretary to compensate *pro tanto* the claims against Directors by their fees for attendance at meetings could not legally apply to a

case like the present, where the only sums demanded from the director are assessed for the payment of specific losses, and not a penny assessed for general purposes. To allow compensation here is to make the few sufferers, to pay whom the assessments sued for in this cause were made, pay out of their special assessments, and necessarily in deduction of their claim, the whole of the defendant director's fees, which he is without excuse for not assessing for, while the company was running. I am with the plaintiff in this pretension, and conclude that the pleas should be overruled, and the plaintiff should have judgment for \$139.70.

Trenholme & Taylor for plaintiff.*Pagnuelo & St. Jean* for defendant.

SUPERIOR COURT.

MONTREAL, June 28, 1883.

Before TORRANCE, J.

MORIN V. BERGER et al.

Patent—Infringement.

This was an action of damages against the defendants for alleged infringement of plaintiff's rights as inventor of a new key for water taps or cocks, to open and shut in their boxes the cocks with double or multiplied openings without possible mistake. Plaintiff obtained on the 2nd October, 1879, letters patent under 35 Vic. Cap. 26, Can., protecting his invention. He complained that the defendants in July, 1879, proposed to buy his invention and borrowed the model and plans, and the written explanations in connection with the same, and used the invention without his consent. The demand was for an injunction against the defendants, forbidding them to use the invention, and for damages. The defendants pleaded that the system of stop cocks and keys used by plaintiff, and described in his so-called invention was not new and had been in use for a great number of years, that it was to be found in the letters patent granted to one Charles B. Dickson, in the United States, on the 22nd February, 1876.

PER CURIAM. First in order, I should dispose of the Dickson patent. Looking carefully at the specification accompanying this patent, I have not any hesitation in saying that it is different from the patent relied upon by the plaintiff. That is my conclusion unhesitat-

ingly on a careful examination of the Dickson patent, and my conclusion is corroborated by the evidence of witnesses for the plaintiff. Then, as to the invention claimed by plaintiff for which he has secured a patent, the chief merit appears to be a cock with a conical-shaped head upon which fitted a conical shaped key. By means of it a cock out of sight underground could be opened or shut at will, so as to distribute or shut off the supply of water furnished to houses on a street. And it is not necessary to enter into the house in order to know whether the water is on or off in the house. None of the other inventions exhibited by the defendants, and relied upon by them to defeat the demand of plaintiff, work in the same way to produce the same result. I am satisfied with the evidence of Mr. Bradley among others on this point. Plaintiff explained his plan to defendants, supplying them with drawings and model. It was communicated to Mr. Beaudry, the engineer employed by defendant, and the apparatus prepared by him for the defendants had the conical peculiarity of plaintiff's invention, and Beaudry examined as a witness says that the conical shape came either out of his own head or from the plaintiff's plans. Plaintiff wrote to defendants that they might use his invention for a sum of \$300, but they declined the offer. Nevertheless they used the invention. The evidence of Gidney, Duncan, Smith and Desbarats is clear on this point. The Court therefore holds that the claim for damages is proved, and these are assessed at the sum of \$500.

Perras & Co., for plaintiff.

Beique & Co., for defendants.

TEXAS COURT OF APPEALS.

WOOLRIDGE V. STATE.

Verdict—Misspelling.

A verdict in these words, "We, the jury, find the defendant guilty of murder in the 'fist' degree, and assess his punishment at death, is a nullity.

WHITE, P. J. On the night of the 11th August, 1882, Antone Roerich was assassinated at his home in Fayette county. Appellant and one Nathan Stevens were jointly indicted for the murder. On the 25th of November, appellant was alone placed upon trial, and the result

was his conviction of murder in the first degree, with the penalty assessed at death. From this judgment of conviction he appeals to this Court. Several supposed errors are complained of as grounds for a reversal of the judgment, the most important of which are: 1. That the Court erred in overruling his application for a continuance. 2. Error in refusing to give in charge to the jury special instructions requested in behalf of the defendant upon the law of circumstantial evidence, and, 3. Nullity of the verdict rendered by the jury. * * * Under all the circumstances shown by the evidence before us, it is neither credibly true, nor probably true, that he was present at the church and conversing with the absent witness when the deed was committed, and so believing we cannot say that the action of the Court in overruling the motion for a new trial, so far as it rested upon this ground, was erroneous.

Nor did the Court err in refusing to give the requested special instruction upon circumstantial evidence in charge to the jury. There could be no more positive and direct testimony than that of the murdered man's wife as to the identity of the defendant, and the fact that he fired the fatal shots which deprived her husband of his life. This was the main fact, and the circumstantial evidence adduced was consistent with and only in corroboration of it. We come now to the consideration of the objections urged to the sufficiency and validity of the verdict. It is in these words, viz.: "We, the jury, find the defendant, Ben. Woolridge, guilty of murder in the *fst* degree, and assess the punishment at death."

Instead of the word "first," the jury have used the word "fst," or in spelling the word "first," have omitted the letter "r." This is the error contended for, *e.g.*, that the jury have not found defendant guilty of murder in the first degree, and that consequently the judgment rendered was not warranted, nor is it supported by the verdict. Defendant presented the insufficiency of this verdict as one of the grounds of his motion for a new trial, which was overruled.

A most serious question is here presented, and no case directly in point has been found in our own, or the decisions of other courts of the country. We must determine it by a fair and proper construction of our statutes relating

to the subject matter by analogies drawn from well-settled principles of the law. It is to be particularly noted that here we have no case of the misspelling of a word. The word used is "fist," is properly spelled "fist," and is a word as well defined and as well known to the English language as any other word in common use. It is further to be noted that this word "fist" is not, and cannot, by any contortion of pronunciation, be made to sound like the word "first," and consequently the well-recognized doctrine of *idem sonans* is not applicable, and must be eliminated from the discussion.

Now, what are the statutory and legal rules with regard to verdicts? * * * As seen it is expressly declared that "the verdict in every criminal case must be general." What is meant by this? Simply that the verdict must find generally that defendant is "guilty" or "not guilty." Every verdict must ascertain and declare one or the other of these general issues—issues general, because involved in all criminal cases. Beyond this general feature of the verdict, in each particular case the evidence may be said to be *quasi* special, to the extent that it declares the special plea of defendant (when interposed) "true" or "untrue," whenever it assesses a punishment, or in a prosecution for an offence consisting of different degrees, where it acquits of the higher, and finds an inferior degree. * * *

So, then, it appears that with regard to misdemeanors and ordinary felonies, there are certain matters which the verdict must also specifically declare, and which, if not declared, cannot be cured by intendment, inference, or necessary deduction. And it will be seen that these matters which are incurable if not found, and incapable of explanation if not certainly and explicitly found, are all those which by law are specifically and exclusively confided to the jury, and to them alone, and in so far as they are thus confided the verdict will be, and must be, treated as special with reference to them.

Now, let us see what differences, if any, exist in the rules above noted and those applicable to murder cases. At the very outset of the investigation we are met with the statute which declares that "if the jury shall find any person guilty of murder, they shall also find by their verdict whether it is of the first or second degree; and if any person shall plead guilty to

an indictment for murder, a jury shall be summoned to find of what degree of murder he is guilty, and in either case they shall also find the punishment." Penal Code, art. 607. Language cannot well be stronger or more imperative. "They shall also find by their verdict whether it (the murder) is of the first or second degree." * * * All the authorities in our State (except *Holland v. State*, 38 Tex. 474, which has been overruled) hold, as in *Buster's* case, that in a murder trial the verdict of conviction must specify the degree. *Clark's Crim. L.* 214, note "Verdict."

In all the other States where the statute requires that the verdict shall find the degree in murder cases (with the exception of New York alone) a similar construction has been adopted to that enunciated in *Buster's* case, as above quoted. Mr. Bishop says: "The view sustained by most of the authorities, and probably best in accord with the reason of the thing, is that the legislature meant by this provision to make sure of the jury's taking into their special consideration the distinguishing features of the degrees, and passing thereon. Hence, this provision is in the full sense mandatory, and unless they find the degree in a manner patent on the face of the verdict, without help from the particular terms of the indictment, it is void. * * *

When we apply these plain and well settled rules to the verdict before us, what is the inevitable conclusion which forces itself upon us as to its insufficiency measured by analogy with these standards of the law? Have the jury found the defendant guilty of murder in the first degree? To enable us so to hold we must strike from the verdict a word which they have plainly spelled—a word in everyday use in our language—and substitute in its place another and entirely different word, which we only infer they must have intended instead of the one they have used. Can we do this? If so, then we can take the same liberty with any word used. If courts can be allowed to indulge in such reference and intendments in cases involving the life and liberty of the citizen, then why have the inestimable right of trial by jury at all? If the Court can substitute a verdict which the jury have not found, or find one, when they have found none at all, then why have a jury? If the jury are required

to declare the issues found in their verdict, then, unless the issues are found by them the verdict is not theirs. There must be no doubt, to be supplied by mere intendment or inference, when the life of a human being is dependent upon it. This Court will not assume such responsibility whilst the law fixes the determination of the issue alone in the breasts and consciences of the twelve jurymen of the country. We may be satisfied of defendant's guilt in the first degree and we may be satisfied the jury so intended to find, but until they have so expressly found, we cannot give our sanction that human life shall be taken whilst there is any uncertainty with regard to it. The jury have not expressly found it in this case. Their verdict is not only uncertain but unintelligible and senseless. Even *idem sonans* will not aid it. It finds defendant simply guilty without finding the degree, and such a verdict, by all authorities, is held insufficient.

But it may be said the verdict ought to stand, because when the jury brought and returned it into court, it was evidently read "*first degree*" by the clerk, and assented to by the jury as thus read. It seems they have some such rule of receiving and construing and doctoring up written verdicts over in Louisiana, but the reason why they assume such authority in that state is stated in the case of *State v. Ross*, 32 La. Ann. 854. In that case it was held that the verdict of the jury is not illegal and null, because written "guilty without capital punishment," when read aloud and distinctly announced by the clerk as "guilty without capital punishment." Besides the law does not require, even in cases of capital punishment, that the jury should reduce their verdict to writing. Here, as we have seen, the verdict must be in writing, and the Louisiana rule cannot be invoked.

In conclusion, we hold that the verdict in this case is a nullity—the jury have not found the degree of murder of which defendant was guilty. This the law requires they shall do. If defendant is to hang, let him hang according to law! . . . Because the verdict in this case is insufficient, and does not support the verdict rendered, the judgment is remanded for a new trial.

Reversed and remanded.

UNITED STATES DECISIONS.

Burglary—Evidence—Good Character.—On a trial for burglary and larceny the court charged thus: "However good a man's character may have been in the past, if the proof is clear and convincing—that is, convincing of guilt—it would be the duty of the jury to say so. Good character helps where the proof is doubtful or uncertain, or when there is reasonable doubt of the guilt of the party; but when this does not exist it becomes the solemn duty of the jury to say, if they believe it, the word 'guilty.'" An accused party who is of good reputation is entitled to the benefit of it in all cases. *People v. Garbutt*, 17 Mich. 9; *Remsen v. People*, 43 N. Y. 6; *Stoner v. People*, 56 id. 515; *State v. Patterson*, 45 Vt. 308; *Williams v. State*, 52 Ala. 41; *Harrington v. State*, 19 Ohio St. 269; *Silvus v. State*, 22 id. 90; *State v. Henry*, 5 Jones (N. C.), 56; *Kestler v. State*, 54 Ind. 400. But the trial judge gave no instruction to the contrary of this; he merely told the jury that if the evidence was convincing beyond a reasonable doubt, it was their solemn duty to convict notwithstanding the good reputation. This was correct. *Michigan Supreme Court*, Feb. 27, 1883. *People of Michigan v. Mead*. Opinion by Cooley, J.

Larceny—Conversion of horse hired not.—If a person hire a horse with a *bona fide* intention of returning it, a subsequent conversion of the property is not larceny, but may be evidence of an original felonious intent. But a subsequent conversion of the property merely may not be sufficient evidence of such an original intent. In *Regina v. Brooks*, 8 Car. & P. 295, it is held that the subsequent offer to sell the property was not considered sufficient evidence of the felonious hiring or taking in the first place, unless from the circumstances it appears that the hiring was only a pretext, made use of to obtain the property for the purpose of afterward disposing of it. The law applicable is as well stated in *Semple's case*, 2 East, P. C. 691, as in any which can be found in the books: "It is now settled that the question of intention is for the consideration of the jury, and if in the present case, the jury should be of opinion that the original taking (of the property) was with the felonious intent to steal it, and the hiring a mere pretence to enable him (the prisoner) to effectuate that design without any intention to

restore it or pay for it, the taking would amount to a felony; but if there was a *bona fide* hiring and a real intention of returning it at that time, the subsequent conversion of it could not be a felony." See also Pear's case and Charles Wood's case, id. The principle is more briefly stated, id. 665: "If it be proved that there was no trespass or felonious intent in taking the goods no subsequent conversion of them can amount to a felony." Wisconsin Supreme Court, April, 4, 1883. *Hill v. State of Wisconsin*, Opinion by Orton, J.

SUPREME COURT DECISIONS.

To the Editor of the LEGAL NEWS:

SIR,—Uniformity of jurisprudence was desired and no doubt looked for in the creation of the Supreme Court, primarily of course in so much of the general law as was applicable to all the Provinces.

With regard to the peculiar systems of each separate Province, it could be only hoped for through a careful study by the judges of that Court of the systems prevailing in each Province and a reasonable deference to the opinions of experienced judges in the administration of these systems in the respective Provinces. The experience of the past develops points of weakness in the system adopted for our Supreme Court.

A case comes up for decision from the Province of Ontario involving a most important principle of law applicable to all the Provinces. The judges of the Supreme Court find themselves equally divided in opinion. The original judgment is in consequence confirmed. A similar case comes up from the Province of Quebec, decided in quite the opposite sense, and on the same division of opinion of the judges of the Supreme Court, the original judgment in the last mentioned case is also confirmed. The result is, one jurisprudence for Ontario and the opposite of it for Quebec.

Now this palpable anomaly might be quite the reverse of what it seems if its action was to support the law peculiar to any particular one of the Provinces, as for instance our own Province of Quebec where the civil law system, founded on the Roman law, prevails in contradistinction to the common law of England introduced into other of the Provinces. But

let us see what takes place in practice in this last class of cases. A case comes up from Quebec depending for its decision on the law peculiar to that Province. It has perhaps all the judges of that Province who could sit, in its favor, or, it may be, with one exception as has happened lately. The judgment is upset in the Supreme Court by a bare majority out of five, that majority perhaps composed of judges taken from the other Provinces, or perhaps including one judge from Quebec. It can scarcely be expected that confidence can be inspired by such decisions. One precaution the Supreme Court itself might take in such cases which is, never to decide any such without having a full court of six judges, and to see that in the number the two appointed from the Province of Quebec were included. The importance of these points must be acknowledged by all observers. C.

GENERAL NOTES.

It would seem that the law is already stringent enough against inn-keepers, but in *White v. Smith*, 15 Vroom, 105, they are held to be insurers of the persons of their guests against kidnapping! It is there said: "By the common law, an inn-keeper is bound to receive a guest and the goods he brings with him in the ordinary way, and is liable for their value in case they be stolen."—*Albany Law Journal*.

Two recent cases before the Court of Claims, *Von Hoffman v. The United States*, and *The Manhattan Savings Institution v. The same*, involved an important question. Certain coupon bonds of the United States, known as Five-Twenties, on their face payable July 1, 1885, had been "called" for redemption by the Secretary of the Treasury, in conformity with their terms and statutes in that behalf, and had become redeemable under these calls, when they were stolen from the Savings Institution, and afterwards bought for full value, in entire good faith, with due care and without notice, by Von Hoffman. The sole question was, whether these bonds which, in the absence of a call for redemption, did not mature until 1885, did, by reason of the call, become overdue paper, which Von Hoffman took subject to any defects of title, and to the paramount rights of the true owner. In an opinion of great clearness, Chief Justice Drake distinguishes this class of bonds, redeemable before their face maturity at the maker's pleasure, from ordinary commercial paper, whose date of payment is absolute upon its face, and reaches the conclusion that the bonds in question did, in law, mature on the day when the holders had the right, in pursuance of the Secretary's call, to receive payment; and that whoever bought the bonds thereafter took them as overdue paper, with only such title as the vendor had, and liable to have such title disputed and successfully impeached.—*American Law Review*.

The Legal News.

VOL. VI. AUGUST 4, 1883. No. 31.

JUDICIAL CHANGES.

An Act to amend the Act relative to the constitution of the Superior Court, 46 Vic., Cap. 13 (Quebec), came into force on the 1st May, by proclamation of the Lieutenant-Governor of Quebec, dated 11th April, 1883, published in the Quebec *Official Gazette*, of 17th April, 1883. By this Act the number of judges resident in Montreal was fixed at eight.

By an Order-in-Council passed at Ottawa by the Dominion Government, of date 23rd June, 1883, Mr Justice Mathieu, previously resident in the District of Joliette, was removed to Montreal as the eighth judge.

HUSBAND AND WIFE.

A recent decision of the Court of Session in a case of *Thompson v. Thompson*, affords in rather a new direction, an illustration of the change which is coming over the relation of husband and wife in the eye of the law. We have not the full facts of the case before us, but so far as we understand it was an application by the wife for the allotment of a sum of money in the name of aliment for her child and expenses of her own case. The application was refused, Lord Fraser, in giving judgment resting his decision on the ground that the principles established in the last Married Women's Property Act involved a modification of the practice of the courts in respect to alimony. "I have come to the conclusion," his Lordship is reported to have said, "that in consequence of the recent Married Women's Property Act a wife in an action of divorce must in future litigate at her own charges like any other litigant. A woman can now carry on business like her husband, and earn her own livelihood like him, and there is therefore no ground for insistence on the rule which formerly prevailed, and which has worked practical injustice in a great many cases." Without knowing precisely the circumstances before the court, it is impossible to estimate the full effect of the above language. It is clear, however, that his Lordship regards himself as enunciating to some extent a

new principle, and the point is one which is likely sooner or later to occupy the attention of the English courts. So far as we are aware, it has been the practice in Scotland, as well as in England, to take into consideration any existing income of the wife, whether arising from her own exertions or from other sources, in allotting alimony *pendente lite*. But to make allowance for the mere capacity of the woman to earn her own living, if that was the point decided by Lord Fraser, is, we believe an innovation on the existing practice in Scotland, and, except in very exceptional cases, in England also. At any rate, Lord Fraser's language shows the very unexpected ways in which the Married Women's Property Act from time to time operates. The Act is indeed a double-edged tool, and the above is only one of the many cases which have recently proved its capacity for cutting in either direction.—*Law Times* (London.)

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, June 16, 1883.

Before RAINVILLE, J.

ROSS et al. v. O'LEARY and O'LEARY, petitioner.

Contempt—Imprisonment.

Held, that a person over 70 years of age is not exempt from imprisonment for contempt of Court.

The judgment is as follows:—

"La Cour après avoir entendu les parties par leurs avocats contradictoirement sur la requête produite le 4 juin courant par le défendeur pour le faire mettre en liberté, examinée la procédure et les pièces produites, et la preuve, et délibéré ;

"Attendu que par sa requête le dit requérant allègue que le 20 août 1882, il aurait été arrêté en vertu d'un bref de capias émis en cette cause, lequel capias a été contesté par le dit défendeur requérant, et maintenu par jugement de cette Cour rendu le 30 novembre dernier ; que quelques jours après un bref de saisie-arrest après jugement aurait été émis contre le dit défendeur à la poursuite du demandeur ; que sur une règle émise en cette même cause et déclarée absolue, le dit requérant a été condamné à être emprisonné dans la prison commune de ce district

jusqu'à ce qu'il a payé la somme de \$255.16, et qu'en vertu d'un mandat d'arrestation émis sur la dite règle le dit requérant aurait été incarcéré ;

"Attendu que le dit requérant allègue qu'il est âgé de plus de soixante-dix ans, savoir de soixante-treize ans, et qu'il a droit en conséquence d'obtenir sa libération ;

"Attendu qu'il allègue en outre que le dit mandat d'arrestation est irrégulier et illégal en autant qu'il a été émis pour un montant plus considérable que celui pour lequel il a été condamné ;

"Considérant que le dit requérant a prouvé qu'il est âgé de plus de soixante et dix ans, mais considérant que la dite règle a été émise parceque le dit requérant s'était rendu coupable de mépris de Cour en divertissant et cachant ses effets pour en empêcher la saisie ;

"Considérant que les dispositions de l'article 793 du Code de Procédure Civile sont tirées du chapitre 87 des Statuts Refondus du Bas Canada, lequel ne s'applique qu'à l'incarcération en vertu d'un capias, et qu'interpréter le dit article de manière à donner droit à toutes personnes âgées de plus de soixante-dix ans de se libérer mêmes quand elles auraient été emprisonnées pour mépris de Cour, serait contraire à la justice et mettrait les tribunaux dans l'impossibilité de faire exécuter leurs ordres ;

"Considérant que le requérant n'a pas prouvé les autres allégations de sa dite requête ;

"Rejette la dite requête avec dépens distraits à Maître J. P. Cooke, avocat des demandeurs."

P. B. Laviolette, for petitioner.

J. P. Cooke, for plaintiffs.

COUR SUPÉRIEURE.

MONTREAL, 30 Novembre 1882.

Coram PAPINEAU, J.

LEVIN V. TRAHAM.

Pouvoirs du tuteur.

JUGÉ :—Que le tuteur ne peut faire commerce pour et au nom de son pupille.

Que le mineur pour échapper à la responsabilité de ces actes de commerce peut simplement en plaider la nullité sans alléguer et prouver lésion.

Dame Adéline Rébecca Rousseau, épouse séparée de biens du défendeur, faisant de son vivant commerce à Nicolet sous la raison sociale de "Traham & Cie."

A sa mort, le défendeur fut nommé tuteur à

son enfant qui hérita du fonds de commerce de sa mère. Le défendeur continua le commerce pour et au nom de son enfant mineur, achetant ici au comptant, là à crédit, ou réglant par billet promissoire signé H. Traham, tuteur.

La présente poursuite était pour un de ces billets et pour marchandises vendues et livrées pour ce commerce.

Le défendeur plaida qu'il n'avait qu'un pouvoir administratif, que le commerce n'était pas un acte d'administration, et que les billets promissoires qu'il avait donné comme l'achat des marchandises fait par lui étaient nuls.

PER CURIAM. "Considérant qu'il est prouvé que le montant du billet en question en cette cause a été donné pour la balance du prix de certaines marchandises vendues et livrées par les demandeurs au défendeur en qualité de tuteur à son enfant mineur âgé de moins de quatre ans, lorsqu'elles ont été ainsi vendues ;

"Considérant que le tuteur n'a en vertu de la loi qu'un pouvoir d'administration sur les biens du mineur, et qu'il n'a pas le droit de faire le commerce pour son enfant mineur et au nom de ce dernier ;

"Considérant que le défendeur en qualité de tuteur a acheté des demandeurs les marchandises en question dans cette cause à crédit, pour les revendre ensuite, non-seulement a fait un acte dépassant les bornes de l'administration d'un tuteur, mais qu'il a contrevenu indirectement à l'article 279 du Code Civil ;

"Considérant que la vente faite par les demandeurs au défendeur en qualité, sous les circonstances, n'est pas légalement une vente faite au mineur qu'il ne représentait pas, et qu'elle est nulle quant à ce dernier, et qu'en pareil cas le mineur n'a pas besoin de prouver lésion ;

"Considérant que le tuteur agissant en dehors des limites de l'autorité que lui donne la loi, ne lie pas son pupille, mais n'oblige que lui-même en sa qualité personnelle ;

"Considérant que le défendeur en qualité n'avait pas le droit d'acheter les marchandises en question à crédit, sans autorisation, même pour aider à l'écoulement du fonds de commerce dont son pupille a hérité, et que d'ailleurs, eût-il eu ce droit, il n'est pas prouvé que ces marchandises aient actuellement servi à l'écoulement du dit fonds de commerce ;

"Considérant que les demandeurs ne peuvent pas même prétendre qu'ils ont droit de se faire

payer la valeur des dites marchandises, en autant que le mineur en aurait profité, attendu qu'il n'est pas prouvé que de fait elles aient profité au dit mineur ;

"Considérant que la preuve faite par les demandeurs que les marchandises en question ont été vendues aux prix ordinaires du marché en gros, n'est pas la preuve que le mineur soit devenu par là plus riche d'une somme égale au montant du prix d'achat de ces marchandises qui ont pu ou peuvent être encore une cause de perte pour le mineur ;

"Considérant que les demandeurs n'ont pas établi leur droit d'action contre le défendeur et que la défense est bien fondée et suffisamment prouvée, renvoie l'action des demandeurs avec dépens."

T. & C. O. de Lorimier, avocats des demandeurs.

Mercier, Beausoleil & Martineau, avocats du défendeur.

SUPERIOR COURT.

MONTREAL, July 9, 1883.

Before TORRANCE, J.

THE OSHAWA CABINET CO. v. SHAW et al.

Revendication—Possession.

This was a seizure and revendication of a horse, waggon and harness in the possession of the defendants, against the will of plaintiffs, the proprietors. The defendants denied that they had possession of these things; said that plaintiff had sold them their business in December, 1881, and placed the articles claimed in the possession of one Moore, to be sold by him, and meanwhile the defendants were to have the use of them by paying for the keep of the horse; that the horse always remained in the possession of said Moore until about the time of the seizure, when Moore sold the horse to one Murphy who was in possession at the time of the seizure. The plaintiff answered that the horse and other things were not placed in the custody of Moore to be disposed of by him, but in the hands of the defendants to be worked by them; that Moore had not been in plaintiff's employ since December, 1881, and if the things claimed were in the possession of Moore they were in his possession as employee of the defendants who had the use and control of them up

to and at the time of the seizure, and the things were seized in their possession.

PER CURIAM. The question here is mainly one of possession, and it is necessary carefully to look at the facts of record. They are to be found mainly in the depositions of the two Messrs. Gibbs, Moore, Murphy, the alleged buyer, and James Elder. Taking up first the deposition of Frederick W. Gibbs, he was the manager of the plaintiff, and when the business was sold to the defendants in December, 1881, the horse and other articles in question were left with Shaw and Gowdey. They made the suggestion to leave the horse with them till the Spring, when a better price could be got for him. He bought the horse from a farmer at Oshawa for \$150. He subsequently instructed his brother, who was here, to get the horse, &c., from Shaw & Gowdey to put them into the hands of Mr. Potter, for sale by auction. In cross-examination he says that the last thing he told Moore was to confer with his brother on all things connected with their business here. He had never thought of giving over possession of the horse to Moore for the very reason that Shaw & Gowdey had urged him to leave it with them, and Moore thought of going west to Winnipeg. In March (31st) he wrote Moore not to collect money for the company, but to refer parties to Mr. Samuels, their collector. He further says Moore was simply to see what offers he could get for the horse, and communicate them to the manager. Charles L. Gibbs, another witness, says that about the 10th May, he saw Moore about the horse, and was told by him that he had a standing offer for all of \$150. He wrote this to the manager who telegraphed back to hand over the articles to Mr. Potter for sale by auction. Thereupon he gave Potter an order in writing upon the defendants to deliver them. They refused delivery, and explained that they were under seizure by the *Minerve* for \$18.75. He immediately settled this claim and got an order from the lawyers upon the guardian to the seizure, who was Moore, for delivery of the horse &c. Showing this order to Mr. Gowdey, one of defendants, he said they could not give up the horse till the landlord was settled with. He then settled with the landlord, returned immediately to Shaw & Gowdey, informed them of the settlement, and asked for the horse. At that moment Murphy came forward, and said the

horse, &c., belonged to him, and exhibited a receipt for \$125. The horse had been advertised to be sold on 23rd May, by Potter, and he, Gibb, had told Gowdey, previously, that he had been instructed to sell horse, &c., for \$175. Gowdey told him he had given the landlord his word not to let the horse go till he was settled with. Moore, another witness, was in the employ of Shaw & Gowdey from December to June. He (Moore) says, he was to sell the horse, if he could do so, and see, meanwhile, that he was well taken care of. The horse was driven by James Elder, in the employ of Shaw & Gowdey. Moore says he had control of the horse, and not Shaw & Gowdey. He admits seeing Charles T. Gibb in May, about the horse. He told him of an offer of \$150, and asked if he should take it, and was told to do so. Then Moore saw the horse advertised. The same day he saw Charles Gibb, who asked him for the horse. "I told him of the *Minerve* seizure. He went away and brought back an order on me to surrender the horse as the debt was paid. Well, as soon as the seizure of the *Minerve* was taken off I sold the horse to Murphy."

In cross-examination, he says that Murphy did nearly all the cartage for Shaw & Gowdey. Moore saw Gibb more than once on the day he sold the horse to Murphy, but said nothing to him about selling the horse to Murphy. He said he had Murphy's offer three months. He admits that in March he received instructions not to receive moneys. The money received for the horse by Moore, is in the hands of the defendants' attorneys. He had a letter from plaintiff's manager in January, saying that if he could not get \$125 for the horse alone, the manager would bring it back to Oshawa. James Murphy, another witness, says he was the buyer of the horse. James Elder was then driving the horse for the defendants, or Moore, he says. He, Murphy, leased the horse then to Shaw & Gowdey, and Elder continued to drive him, and they paid Elder. He got \$3 per day for the horse. He did not pay Elder. Elder says he was driving the horse when the seizure took place; was driving him for Moore in Mr. Murphy's waggon, and drove him for a month afterwards carting defendants' goods, and was paid all the same by Moore.

Three or four simple facts appear very plainly from this narrative. Shaw & Gowdey had the possession of the horse, &c., and Moore, their

clerk, held it under them. The horse was used every day in their business till a month after the seizure. So the driver, Elder, says. He was in Elder's possession when seized, doing their work. Shaw & Gowdey and Moore knew that the horse was wanted by the owner when sold on the 25th May. It is grossly improbable that Moore, their clerk, would sell him suddenly without their knowledge. Things went on as regards the horse in the same way for a month after the seizure, according to Elder the driver, he driving the horse and being paid by Moore. The cross-examination of Moore and Murphy, the buyer, witnesses for defendants, when cross-examined by plaintiff, shows a most evasive spirit. On the day of the sale, one obstacle after another was put in the way of Gibb getting the horse until 3 p.m., when Murphy came forward and said he was proprietor, having just bought him. There is proof of the seizure of the horse but not of the waggon or harness. The order will go that the horse, harness and waggon be given up, or that the defendants pay \$175. Costs in either case against them.

Greenshields, Busted & Guerin for plaintiff.

Kerr & Carter for defendant.

JUDICIAL COMMITTEE OF PRIVY COUNCIL.

July 18, 1883.

Present: THE LORD CHANCELLOR, SIR BARNES PEACOCK, SIR MONTAGUE SMITH, SIR ROBERT P. COLLIER, and SIR ARTHUR HOBHOUSE.

ATTORNEY GENERAL OF ONTARIO v. MERCER

Escheat—Rights of Provincial Government.

Lands in Canada escheated to the Crown for defect of heirs belong to the Province in which they are situate, and not to the Dominion of Canada.

The judgment of their lordships was delivered by

THE LORD CHANCELLOR.—The question to be determined in this case is whether lands in the Province of Ontario escheated to the Crown for defect of heirs belong (in the sense in which the verb is used in the British North America Act, 1867) to the Province of Ontario or to the Dominion of Canada.

By the Imperial Statute 31 George III., cap. 31, section 43, it was provided that all lands

which should be thereafter granted within the Province of Upper Canada (now Ontario) should be granted in free and common socage in like manner as lands were then holden in free and common socage in England. The argument before their lordships on both sides proceeded upon the assumption that the lands now in question were so holden. All land in England in the hands of any subject was holden of some lord by some kind of service, and was deemed in law to have been originally derived from the Crown, "and therefore the King was Sovereign Lord, or Lord paramount, either mediate or immediate, of all and every parcel of land within the realm" (Co. Litt., 65a). The King had "*dominium directum*," the subject "*dominium utile*" (*ibid.*, 1a). The word "tenure" signified this relation of tenant to lord. Free or common socage was one of the ancient modes of tenure ("a man may hold of his lord by fealty only, and such tenure is tenure in socage," Litt. Sec. 118), which, by the statute 12 Charles II., cap. 24), was substituted throughout England for the former tenures of knight-service and by socage *in capite* of the King, and relieved from various feudal burdens. Some, however, of the former incidents were expressly preserved by that statute, and others (escheat being one of them) though not expressly mentioned, were not taken away. "Escheat is a word of art, and signifieth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee is escheated." Co. Litt., 13a). Elsewhere (*ibid.*, 92b) it is called "casual profit," as happening to the lord "by chance and unlooked for." The writ of escheat, when the tenant died without heirs, was in this form:—"The King to the Sheriff, etc. Command A, etc., that he render to B ten acres of land, with the appurtenances in N, which C held of him, and which ought to revert to him the said B as his escheat, for that the said C died without heirs" (F.N.B., 144 F). If there was a mesne lord, the escheat was to him; if not, to the King. From the use of the word "revert," in the writ of escheat, is manifestly derived the language of some authorities which speak of escheat as a species of "reversion." There cannot, in the usual and proper sense of the term, be a reversion expectant upon an estate in fee simple. What is meant is that when there is no longer any tenant, the land returns

by reason of tenure to the lord by whom, or by whose predecessors in title, the tenure was created. Other writers speak of the lord as taking it by way of succession in inheritance, as if from the tenant, which is certainly not accurate. The tenant's estate (subject to any charges upon it which he may have created) has come to an end, and the lord is in by his own right.

The profits and the proceeds of sales of lands escheated to the Crown were in England part of the casual hereditary revenues of the Crown, and (subject to those powers of disposition which were reserved to the Sovereign by the Restraining and Civil List Acts) they were among the hereditary revenues placed at the disposal of Parliament by the Civil List Acts passed at the beginning of the present and the last preceding reign. Those Acts extended expressly to all such casual revenues arising in any of the colonies or foreign possessions of the Crown.

But the right of the several Colonial Legislatures to appropriate and deal with them within their respective territorial limits was recognized by the Imperial Statute 15 and 16 Vic., cap. 39, and by an earlier Imperial Statute (10 and 11 Vic., cap. 71) confirming the Canada Civil List Act passed in 1846, after the union of Upper and Lower Canada, by which Act the provision made by the Colonial Legislature for the charges of the Royal Government in Canada was accepted and taken instead of "all territorial and other revenues" then at the disposal of the Crown arising in that Province, over which (as to three-fifths permanently and as to two-fifths during the life of the Queen and for five years afterwards) the Legislature of the Province was to have full power of appropriation.

It may be remarked that the Civil List Acts of the Province of Canada contained no reservation of escheats, similar to section 12 of each of the Imperial Civil List Acts above referred to. It must have been purposely omitted, in order that escheats might be dealt with by the Government or Legislature of Canada, and not by the Crown, in whose disposition they must have remained if they had not been in that of the United Province of Canada. When, therefore, the British North America Act of 1867 passed, the revenue arising from all escheats to the Crown, within the then Province of Canada, was

subject to the disposal and appropriation of the Canadian Legislature. That Act united into one Dominion, under the name of "Canada," the former Province of Canada (which it subdivided into the two new Provinces of Ontario and Quebec, corresponding with what had been before 1840 Upper and Lower Canada), Nova Scotia, and New Brunswick. It established a Dominion Government and Legislature, and Provincial Governments and Legislatures, making such a division and apportionment between them of powers, responsibilities, and rights as was thought expedient. In particular, it imposed upon the Dominion the charge of the general public debts of the several pre-existing Provinces, and vested in the Dominion (subject to exceptions, on which the present question mainly turns) the general public revenues, as then existing, of those Provinces. This was done by section 102 of the Act, which is in these words:—"All duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick, before and at the Union, had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces or are raised by them in accordance with the special powers conferred upon them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada in manner and subject to the charges in this Act provided." If there had been nothing in the Act leading to a contrary conclusion, their Lordships might have found it difficult to hold that the word "revenues" in this section did not include territorial as well as other revenues, or that a title in the Dominion to the revenues arising from public funds did not carry with it a right of disposal and appropriation over the lands themselves. Unless, therefore, the casual revenue, arising from lands escheated to the Crown after the Union, is excepted and reserved to the Provincial Legislatures within the meaning of this section, it would seem to follow that it belongs to the Consolidated Revenue Fund of the Dominion. If it is so excepted and reserved, it falls within section 126 of the Act, which provides that "such portions of the duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had before the Union power of appropriation as are

by this Act reserved to the respective Governments or Legislatures of the Provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each Province form one Consolidated Revenue fund, to be appropriated for the public service of the Province."

Their Lordships, for the reasons above stated, assume the burden of proving that escheats subsequent to the Union are within the sources of revenue excepted and reserved to the Provinces, to rest upon the Provinces. But if all ordinary territorial revenues arising within the Provinces are so excepted and reserved, it is not *a priori* probable that this particular kind of casual territorial revenue (not being expressly provided for) would have been, unless by accident and oversight, transferred to the Dominion. The words of the statute must receive their proper construction, whatever that may be; but if this is doubtful, the more consistent and probable construction ought, in their Lordships' opinion, to be preferred. And it is a circumstance not without weight in the same direction that, while "duties and revenues" only are appropriated to the Dominion; the public property itself, by which territorial revenues are produced (as distinct from the revenues arising from it), is found to be appropriated to the Provinces.

The words of exception in section 102 refer to revenues of two kinds—(1) Such portions of the pre-existing "duties and revenues" as were by the Act "reserved to the respective Legislatures of the Provinces;" and (2) such "duties and revenues" as might be "raised by them in accordance with the special powers conferred on them by the Act." It is with the former only of these two kinds of revenues that their lordships are now concerned, the latter being the produce of that power of "direct taxation within the Provinces, in order to the raising of a revenue for Provincial purposes," which is conferred upon the Provincial Legislatures by section 92 of the Act.

There is only one clause in the Act by which any sources of revenue appear to be distinctly reserved to the Provinces—viz., the 109th section:—"All lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick, at the Union, and all sums then due or payable for

such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same." The Provincial Legislatures are not, in terms, here mentioned, but the words, "shall belong to the several Provinces" are obviously equivalent to those used in section 126—"are by this Act reserved to the respective Governments or Legislatures of the Provinces." That they do not apply to all lands held as private property at the time of the union seems clear from the corresponding language of section 125, "No lands or property belonging to Canada or any Province shall be liable to taxation"—where public property only must be intended. They evidently mean lands, etc., which were at the time of the union in some sense and to some extent *publici juris*, and in this respect they receive illustration from another section, the 117th (which their lordships do not regard as otherwise very material)—"The several Provinces shall retain all their respective public property not otherwise disposed of by this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country." Their lordships are not satisfied that section 102, when it speaks of certain portions of the then existing duties and revenues as "reserved to the respective Legislatures of the Provinces," ought to be understood as referring to the powers of Provincial Legislation conferred by section 92. Even, however, if this were so held, the fact, that exclusive powers of legislation were given to the Provinces as to "the management and sale of the public lands belonging to the Province," would still leave it necessary to resort to section 109 in order to determine what those public lands were. The extent of the Provincial power of legislation over property and civil rights in the Province cannot be ascertained without at the same time ascertaining the powers and rights of the Dominion under sections 91 and 92, and therefore cannot throw much light on the extent of the exceptions and reservations now in question.

It was not disputed, in the argument for the Dominion at the Bar, that all territorial revenues arising within each Province from "lands"

(in which term must be comprehended all estates inland) which at the time of the union belonged to the Crown, were reserved to the respective Provinces by section 109, and it was admitted that no distinction could, in that respect, be made between Crown lands then ungranted and lands which had previously reverted to the Crown by escheat. But it was insisted that a line was drawn at the date of the union, and that the words were not sufficient to reserve any lands afterwards escheated which at the time of the union were in private hands and did not then belong to the Crown. If the word "lands" had stood alone it might have been difficult to resist the force of this argument. It would have been difficult to say that the right of the lord paramount to future escheats was "land belonging to him" at a time when the fee-simple was still in the freeholder. If capable of being described as an interest in land, it was certainly not a present proprietary right to the land itself.

The word "lands," however, does not here stand alone. The real question is as to the effect of the words "lands, mines, minerals, and royalties" taken together. In the Court of Appeal of the Province of Quebec it has been held that these words are sufficient to pass subsequent escheats; and for this purpose, stress was laid by some at least, of the learned Judges of that Court (the others not dissenting) on the particular word "royalties" in this context.

If "lands and royalties" only had been mentioned (without "mines" and "minerals") it would have been clear that the right of escheats, whenever they might fall, incident at the time of the Union to the tenure of all socage lands held from the Crown, was a "royalty" then belonging to the Crown within the Province, so as to be reserved to the Province by this section and excepted from section 102. After full consideration, their Lordships agree with the Quebec Court in thinking that the mention of "mines" and "minerals" in this context is not enough to deprive the word "royalties" of what would otherwise have been its proper force. It is true (as was observed in some of the opinions of the majority of the Judges in the Supreme Court of Canada) that this word "royalties" in mining grants or leases (whether granted by the Crown or by a subject) has often a special

sense, signifying that part of the *reddendum* which is variable and depends upon the quality of minerals gotten. It is also true that in Crown grants of land in British North America the practice has generally been to reserve to the Crown not only Royal mines properly so called, but minerals generally, and that mining grants or leases had before the Union been made by the Crown both in Nova Scotia and New Brunswick, and that in two Acts of the Province of Nova Scotia (one as to coal mines and the other as to mines and minerals generally) the word "royalties" had been used in its special sense as applicable to the variable *reddenda* in mining grants or leases. Another Nova Scotia Act of 1849, surrendering to the Provincial Legislature the territorial and casual revenues of the Crown arising within the Province, was also referred to by Mr. Justice Gwynne. But the terms of that Act were very similar to those now under consideration, and if "royalties" in the context which we have here to consider, do not necessarily and solely mean *reddenda* in mining grants or leases, neither may they in that statute. It appears, however, to their Lordships to be a fallacy to assume that, because the word "royalties" in this context would not be inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought therefore to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense, as to (at all events) all the subjects with which it is here found associated—lands as well as mines and minerals. Even as to mines and minerals, it here necessarily signifies rights belonging to the Crown, *jura coronæ*.

The general subject of the whole section is of a high political nature; it is the attribution of Royal territorial rights, for purposes of revenue and government, to the Provinces in which they are situate or arise. It is a sound maxim of law that every word ought *prima facie* to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context. In its primary and natural sense, "royalties" is merely the English translation or equivalent of "*regalitates*," "*jura regalia*," "*jura regia*." (See "royalties," Cowell's Interpreter, Wharton's Law Lexicon, Tomlins' and Jacobs' Law Dictionaries). "*Regalia*" and "*regali-*

lates," according to Ducange, are "*jura regia*," and Spelman (Gloss, Arch.) says, "*Regalia dicuntur jura omnia ad fiscum spectantia*." The subject was discussed, with much fullness of learning, in *Dyke v. Walford* (5 Moore, P. C. 634), where a Crown grant of *jura regalia*, belonging to the County Palatine of Lancaster, was held to pass the right to *bona vacantia*. "That it is a *jus* (said Mr. Ellis in his able argument, *regale* p. 480) is indisputable; it must also be *ibid*; for the Crown holds it generally through England by Royal prerogative, and it goes to the successor of the Crown, not to the heir or personal representative of the sovereign. It stands on the same footing as the right to escheats, to the land between high and low water mark, to felons' goods, to treasure trove, and other analogous rights." With this statement of the law their lordships agree, and they consider it to have been in substance affirmed by the judgment of Her Majesty in Council in that case. Their lordships are not now called upon to decide whether the word "royalties" in section 109 of the British North America Act of 1867 extends to other Royal rights besides those connected with "lands," "mines," and "minerals." The question is whether it ought to be restrained to rights connected with mines and minerals only, to the exclusion of royalties, such as escheats, in respect of lands. Their lordships find nothing in the subject or the context, or in any other part of the Act, to justify such a restriction of its sense. The larger interpretation (which they regard as in itself the more proper and natural) also seems to be that most consistent with the nature and general objects of this particular enactment, which certainly includes all other ordinary territorial revenues of the Crown arising within the respective Provinces.

The conclusion at which their lordships have arrived is that the escheat in question belongs to the Province of Ontario, and they will humbly advise Her Majesty that the judgment appealed from ought to be reversed, and that of the Vice-Chancellor and Court of Appeal of Ontario restored. It is some satisfaction to know that in this result the Courts of Quebec and Ontario have agreed, and though it differs from the opinion of four judges constituting the majority of the Supreme Court of Canada, two of the judges of that Court, including the Chief Justice, dissented from that opinion. This being a question of a public nature, the case does not appear to their lordships to be one for costs.

Judgment reversed.

Horace Davey, Q.C.,	} Counsel for
The Attorney-General of Ontario,	
Raleigh and J. R. Cartwright,	
The Solicitor-General, Lash, Q.C., and Jesse,	} Appellant.
for the Dominion Government.	

The Legal News.

VOL. VI. AUGUST 11, 1883. No. 32.

LORD COLERIDGE'S VISIT.

The Lord Chief Justice and party are expected to arrive August 23. The following rather extensive tour has been arranged by Mr. E. F. Shepard, chairman of the committee of arrangements of the N. Y. State Bar Association:—Monday, August 27, to Irvington by train. W. D. Sloane's reception. Tuesday, August 28, and Wednesday, August 29, at Saratoga. Garden party, etc., at the Grand Union Hotel, fireworks in Congress park. Judge Hilton will entertain the party. Trip to Mt. McGregor. Thursday, August 30, and Friday, August 31, at Newport. Saturday, September 1, at Windsor, Vt., William M. Evarts' guests. Sunday, September 2, rest at the Profile House, White Mountains. Monday, September 3, Fabyan's Twin Mt. House, Glen House, etc. Tuesday, September 4, leave the White Mountains and arrive at Boston. Wednesday, September 5, guests of Gov. Butler and the Commonwealth of Massachusetts; take part in the exercise of the "Manufacturers' and Mechanics' Institute for the purpose of the General Improvement of Manufacturing and Mechanical Interests and the holding of Industrial Exhibitions Annually." Thursday, September 6, in Boston, attending receptions and dinners. Friday, September 7, to Portland and Bangor. Saturday, September 8, at Fredericton, N. B., where Lord Coleridge will visit his old friend, the Bishop of Fredericton, N. B. From Fredericton the party go to St. John and Quebec. At the latter place there will be a reception and dinner. At Montreal there will be a reception. Also at Ottawa. At Toronto a reception by the bar of the Province. Thence the party will proceed to Niagara Falls, the Thousand Islands, Watkins Glen, Rochester, Buffalo (reception), Cleveland, Sandusky, Toledo, Detroit, Chicago (reception by State bar), Milwaukee, St. Paul, Minneapolis, Sioux City, Omaha, Council Bluffs, St. Joseph, Kansas City, St. Louis, Decatur, Logansport, Indianapolis, Dayton, Cincinnati, Springfield, Columbus, Wheeling, Chattanooga, Pittsburgh, Washington, Baltimore, Philadelphia, Mansfield, Sa-

lamanca, Rochester, Syracuse, Albany and New York. The date for the Albany visit has not been settled as yet. In New York the Lord Chief Justice will be given the public reception by the New York State Bar Association, on the conclusion of the trip, which will be in the latter part of October.

PREGNANCY AS GROUND FOR AVOIDING MARRIAGE.

It is quite well settled that there is no implied warranty of chastity on the part of a woman contracting marriage. *Varney v. Varney*, 52 Wis. 130; S. C., 38 Am. Rep. 726. In the case of concealed pregnancy by another man at the time of the marriage, however, the courts have generally given relief to the deceived husband. The most recent case on this subject is *Allen's Appeal*, 99 Penn. St. 196. Here the late Chief Justice Sharswood said: "Thus it is well settled that want of chastity on the part of the woman—ante-nuptial incontinence—even though she may have expressly represented herself as virtuous—forms no ground for avoiding the contract. * * * This seems also to be the dictate of humanity and in conformity to the gospel which so strongly throughout inculcates the duty of mutual forgiveness. For otherwise, one of strong passions, led astray or seduced by the wicked arts of others, could have no hopes for reform. In such cases it is best for society that the past should be entirely buried in oblivion, and that the poor erring creature should have the best chance of a new life of respectability and honor. It is best that the other party should know, when the sin is afterward revealed to him, that it can do no good, but unmixed evil, to make it public by applying for a divorce. They must learn to submit to the inevitable. * * * And if ante-nuptial incontinence be a sufficient ground of nullity as against the woman, it is not easy to see why it should not be so likewise against the man, and the consequence of such a doctrine it is not easy to predict. Actual pregnancy at the time of the marriage presents an entirely different question. It introduces a different element. The marriage status of the parties is changed. The man is then necessarily put to the alternative of either publishing his wife's shame, or submitting to have the child of a

stranger, an alien to his blood, introduced, recognized and educated as his own legitimate offspring." And in this case the submission of the question of fraud to the jury was held to have been proper. The child was born seven months after the marriage.

In *Scroggins v. Scroggins*, 3 Dev. (N. C.), 535, the child was born five months after the marriage, and the husband would not swear that he believed her chaste at the time of the marriage. Ruffin, J., said: "Concealment is not a fraud in such a case—disclosure is not looked for—active misrepresentations and studied and effectual contrivances to deceive are at least to be required, to give it that character; and the other party must appear not to have been voluntarily blind, but to have been the victim of a deception which would have beguiled a person of ordinary prudence. I know not how far the principle contended for would extend. If it embrace a case of pregnancy, it will next claim that of incontinence; it will be said the husband was well acquainted with the female and never suspected her, and has been deceived; then, that he was a stranger to her, smitten at first sight, and drawn on the sudden into a marriage with a prostitute; that he was young and inexperienced, hurried on by impetuous passion, or that he was in his dotage, and advantage taken of the lusts of his imagination, which were stronger than his understanding. From uncleanness it may descend to the minor faults of temper, idleness, sluttishness, extravagance, coldness, or even to fortune inadequate to representations, or perhaps expectations. There is in general no safe rule but this: that persons who marry agree to take each other as they are. * * * He who marries a wanton, knowing her true character, submits himself to the lowest degradation, and imposes on himself. No fraud can be said to be practiced on him by mere silence and concealment of other observations. * * * His attention must have been attracted to the person of the woman he was about marrying, and the long intimacy and courtship which he mentions must have enabled him to detect her situation. Why did he marry her? It may be possible that he was deceived, and not by his own negligence, at that period. But it is impossible that any art or device could have long prevented him from knowing the truth, that is, as far as this, that she was pregnant. If not by

him, why did he live with her?" This was followed in *Long v. Long*, 77 N. C. 304; S. C., 24 Am. Rep. 449.

In *Reynolds v. Reynolds*, 3 Allen, 605, the wife was delivered five months after marriage; and the husband was 17, the wife 30 years old. The marriage was set aside. Bigelow, C. J., said: "The material distinction between such a case and a misrepresentation as to the previous chastity of a woman is obvious and palpable. The latter relates only to her character and conduct prior to the contract, while the former touches her actual present condition and her fitness to execute the marriage contract and take on herself the duties of a chaste and faithful wife. It is not going too far to say, that a woman who has not only submitted to the embraces of another man, but who also bears in her womb the fruit of such illicit intercourse, has during the period of her gestation incapacitated herself from making and executing a valid contract of marriage with a man who takes her as his wife in ignorance of her condition and on the faith of representations that she is chaste and virtuous. In such a case, the concealment and false statement go directly to the essentials of the marriage contract, and operate as a fraud of the gravest character on him with whom she enters into that relation." The court lay stress on the difficulty of ascertaining the fact before marriage by personal intercourse or inquiry, or after marriage, "where, as in the case at bar, the husband was immature and inexperienced." The court also expressly concede the doctrine of continuance of cohabitation, after good reason to know the fact, and except the case where the pregnancy was known beforehand and the husband was deceived into the belief that he was the father. (The latter state of facts existed in *Foss v. Foss*, 12 Allen, 26, and a divorce was denied; and much to the same effect is *Hoffman v. Hoffman*, 30 Penn. St. 417.) *Reynolds v. Reynolds* was followed in *Donovan v. Donovan*, 9 Allen, 140, where it was also held that evidence of express representations of chastity was unnecessary.

In *Baker v. Baker*, 13 Cal. 87, the child was born between four and five months after the marriage. The divorce was granted. The court said: "We do not attach much importance to the suggestion that the plaintiff must have discovered the situation of the defendant

long previous to the birth of the child, and that his silence thereupon must be regarded as an acknowledgment of its paternity. We cannot assume that he detected her pregnancy, and if he had reason to suspect it, that he must have done so at so early a period after marriage as to have referred it to ante-nuptial incontinence. To one, who we must believe from the evidence, possessed a strong affection for his wife, the suspicion of a want of chastity would never arise. Affection will give every excuse for appearances, except that of dishonor." The Court dwelt on the fact that the child would be presumptive heir of the husband's estate, and continued: "A woman, to be marriageable, must at the time be able to bear children to her husband, and a representation to that effect is implied in the very nature of the contract. A woman who has been pregnant over four months by a stranger, is not at the time in a condition to bear children to her husband, and the representation in this instance was false and fraudulent." After enlarging on the disgraceful situation of the husband, the court concluded: "By no principle of law or justice can a man be held to this humiliating and degrading position, except upon clear proof that he has voluntarily and deliberately subjected himself to it." Disapproving *Scroggins v. Scroggins*.

In *Morris v. Morris*, Wright, 630, the complainant was "an honest simple fellow" of 28, "but little used to female society," and the defendant was a Quaker of 35. The child was born in less than a month from the marriage. The marriage ceremony took place in the dusk, without lights, "under circumstances as to the position and movement of the bride, with an arrangement of the full Quaker dress of the ladies, which excited the suspicion of the clergyman. The husband and wife lived together without his suspicions being awakened until the wife was taken in labor pains, and presented her wondering spouse a full grown child before the expiration of the honeymoon." A divorce was granted.

In *Ritter v. Ritter*, 5 Blackf. 81, the husband discovered the wife's condition the next night after the wedding and immediately left her. The statute authorized divorces for certain causes, and for another cause when in their discretion the court should think it reasonable

and proper. The court below refused a divorce, but this was reversed, the court observing that "the court did not exercise its discretion in a sound and legal manner, having due regard to the rights of the injured party, and the purity of public morals."

In *Carris v. Carris*, 9 C. E. Green. 516, the child was born two months and a half after the marriage, the husband had had no previous connexion with the mother, was very young, and was deceived by artifice of dress and conduct. A divorce was granted by the Court of Errors and Appeals, overruling the Chancellor. The court exclude cases of mere incontinence, and mistake of the husband who had had previous connexion. The Court cited the Massachusetts and California cases. Two judges dissented.

Mr. Schouler says (Husb. and Wife, § 27): "We apprehend that the woman who brings surreptitiously to the marriage bed the incumbrance of some outside illicit connection, introduces a disqualification to the union as real as the physical impotence of a man would be, resulting from his own lasciviousness."—*Albany Law Journal*.

NOTES OF CASES.

COUR SUPÉRIEURE.

MONTRÉAL, 9 juillet 1883.

Coram RAINVILLE, J.

LUREAU v. DEBEAUFORT, et les mêmes sur demande incidente.

Chose jugée—Délai pour appeler—Cautionnement pour frais seulement—Identité d'objet.

Jugé, qu'il y a chose jugée entre les parties même pendant le délai accordé par la loi pour appeler d'un jugement.

Que lorsqu'une partie porte un jugement en appel, mais consent à l'exécution du jugement, et ne donne cautionnement que pour les frais, l'appel n'a pas l'effet en droit d'empêcher qu'il y ait chose jugée entre les parties.

Qu'un jugement renvoyant un plaidoyer à une saisie-revendication d'une partie de certains effets par le propriétaire, est chose jugée à l'encontre du même plaidoyer produit par le même défendeur dans une action où le propriétaire réclamait le prix de l'autre partie de ses effets vendus par le défendeur.

Le jugement suivant explique suffisamment les faits de la cause et la contestation liée entre les parties.

"La Cour après avoir entendu les parties par leurs avocats sur la demande incidente faite et produite par le demandeur en cette cause, examiné la procédure, les pièces produites et la preuve et délibéré;

"Attendu que le demandeur allègue qu'en février 1879 il aurait chargé le défendeur de lui vendre des marchandises à commission à raison de dix pour cent sur le prix de chaque vente; qu'à différentes dates à compter de mai 1879, il aurait expédié au défendeur des marchandises pour un montant considérable, que le défendeur aurait vendu des marchandises pour un montant de \$3,259.85, lui donnant droit à une commission de \$325.98, et laissant en faveur du demandeur une somme de \$2,933.87; que le défendeur était obligé de lui remettre les deniers provenant du prix des marchandises après chaque vente; qu'il n'a rien remis au demandeur, et qu'il retient encore la dite somme de \$2,933.87;

"Attendu que le défendeur a plaidé que lors des offres à lui faites par le demandeur de vendre de ses marchandises à commission, le défendeur était employé comme commis-voyageur pour la vente de vins et liqueurs, et qu'au moyen de ce négoce il se faisait un revenu de deux à trois mille piastres par année; que le demandeur s'était engagé d'envoyer au défendeur une quantité considérable de liqueurs pour vendre à commission, que sur la foi de cet engagement le défendeur a laissé son premier emploi pour se consacrer exclusivement à la vente des dites marchandises à commission; que dans ce but il s'est monté un magasin, a fait des dépenses considérables pour s'installer et a déboursé à cet effet \$1,190.13; que le montant d'affaires que le dit défendeur aurait pu faire par année était de \$40,000, sur lequel montant, il aurait pu réaliser un bénéfice considérable; que le demandeur n'ayant pas rempli son engagement et ayant cessé d'envoyer des marchandises au défendeur, ce dernier s'est trouvé sans emploi par la faute du demandeur, et qu'en outre de la somme déboursée comme susdit, il a souffert des dommages pour \$3,000, pour perte de salaire et de bénéfice; que les dites deux sommes réunies sont plus que suffisantes pour compenser le montant réclamé

par le demandeur, et que le défendeur a droit de garder les sommes dont il peut être redevable au demandeur pour se payer de sa réclamation;

"Attendu que le demandeur principal, par sa demande incidente, allègue les faits de la demande principale, et ceux de la défense par laquelle le défendeur plaide compensation;

"Attendu que le demandeur incident allègue de plus que dans une action instituée devant cette Cour sous le No. 732, le dit demandeur a poursuivi le défendeur par saisie-revendication pour obtenir la restitution de cette partie des marchandises qu'il lui avait expédiées pour être vendues à commission, et qui se trouvent encore en nature entre les mains du défendeur; qu'à cette action le défendeur a plaidé par une exception alléguant les mêmes dommages que ceux allégués dans son exception à la présente action, et qu'il prétend lui avoir été causés comme susdit, et concluant à ce qu'il fût déclaré que le défendeur n'est pas obligé de remettre les effets saisis-revendiqués tant que le demandeur ne lui aura pas payé sous forme de compensation les dits dommages; que depuis l'institution de la présente action et la contestation liée sur icelle par la production du plaidoyer, un jugement a été rendu sur la première exception, savoir dans la dite cause No. 732, lequel jugement est devenu exécutoire et a obtenu force de chose jugée; que par le dit jugement la saisie-revendication a été maintenue, et l'exception du défendeur, basée sur les dits dommages, renvoyée comme n'ayant aucun fondement;

"Attendu que le demandeur incident conclut à ce que le plaidoyer de compensation produit dans la présente action soit renvoyé, en autant qu'il y a chose jugée entre les parties sur la dite exception par le jugement rendu dans la dite cause numéro 732;

"Attendu que le défendeur, se portant défendeur incident, a répondu à la dite demande incidente que les faits sur lesquels le jugement dans la cause numéro 732 est basé, et ceux articulés dans la dite demande incidente ne sont pas les mêmes; que le jugement dans la dite cause No. 732 a été rendu le 29 novembre 1881, et est encore susceptible d'appel, le délai pour l'appel n'étant pas encore expiré; que de fait le défendeur a le 4 janvier 1882 interjeté appel du dit jugement dans la cause No. 732, et a

fourni le cautionnement voulu par la loi; et qu'en conséquence le dit jugement n'a pas obtenu force de chose jugée;

"Attendu que le demandeur incident a répondu spécialement à l'exception produite par le défendeur incident à la demande incidente, en disant que le dit défendeur incident n'avait, sur son appel dans la cause No. 732, donné cautionnement que pour les frais d'appel, et avait produit au greffe de la Cour une déclaration qu'il ne s'opposait pas à l'exécution du dit jugement; qu'en conséquence il y a chose jugée; et qu'antérieurement au dit appel le dit défendeur incident avait acquiescé directement et indirectement au jugement rendu dans la dite cause No. 732;

"Attendu que le dit demandeur incident a obtenu permission de produire une réplique spéciale *puis d'arrein continuance* à la susdite exception du défendeur incident, et qu'il allègue dans la dite réplique spéciale que le jugement rendu dans la dite cause No. 732 le 29 novembre 1881 a été le 24 mars 1883, confirmé par le jugement de la Cour d'Appel, lequel jugement est maintenant final et sans appel;

"Considérant que la contestation engagée dans la présente cause est la même que celle engagée dans la dite cause No. 732, est entre les mêmes parties, pour la même cause et pour le même objet quant à la question des dommages réclamés par le défendeur;

"Considérant que par le dit jugement rendu dans la cause No. 732, le défendeur principal a été débouté de ses prétentions pour les dommages qu'il pouvait réclamer du demandeur, et que les dommages qu'il réclame par son exception en cette cause sont basés sur les mêmes faits que ceux allégués dans son exception dans la dite cause No. 732;

"Considérant que la demande incidente pour faire déclarer chose jugée a été produite le 4 janvier 1882, et que l'appel dans la dite cause No. 732 a été pris le 14 janvier 1882;

"Considérant que le dit appel n'a pas eu l'effet en droit d'empêcher l'effet de la chose jugée, en autant que le défendeur n'a donné cautionnement que pour les frais, et a consenti à l'exécution du dit jugement quant au principal;

"Considérant que la dite demande incidente est bien fondée, en ce qu'il y a chose jugée sur l'exception produite par le défendeur principal;

"Considérant en outre que la dite réponse

spéciale produite par le demandeur incident et sa réplique spéciale *puis d'arrein continuance* sont bien fondées, les maintient; déclare qu'il y a chose jugée entre les parties sur l'exception produite par le défendeur principal à l'action du demandeur; déclare la demande incidente bien fondée, et la maintient, et déboute le défendeur incident de sa défense à la demande incidente, et déboute le défendeur principal de son exception à la demande principale, avec dépens de contestation sur la demande incidente contre le dit défendeur et défendeur incident, distraits à Messieurs Barnard, Beauchamp et Creighton, avocats du demandeur incident."

Barnard, Beauchamp & Creighton, pour le demandeur incident.

A. Mathieu, pour le défendeur incident.

(J. J. B.)

TRADE-MARK CONTAINING MISREPRESENTATION NOT PROTECTED.

SUPREME COURT OF THE UNITED STATES.

MARCH 30, 1883.

MANHATTAN MEDICINE CO. v. WOOD.

A court of equity will extend no aid to sustain a claim to a trade-mark of an article which is put forth with a misrepresentation to the public as to the manufacture and as to the place where it is manufactured.

Appeal from the Circuit Court of the United States for the District of Maine. The opinion states the case.

FIELD, J. This is a suit in equity to restrain the defendants from using an alleged trade-mark of the complainant, upon certain medicines prepared by them, and to compel an accounting for the profits made from its use in their sale of the medicines; also the payment of damages for their infringement of the complainant's rights.

The complainant, a corporation formed under the laws of New York, manufactures in that State medicines designated as "Atwood's Vegetable Physical Jaundice Bitters," and claims as its trade-mark this designation, with the accompanying labels. Whatever right it possesses it derives by various mesne assignments from one Moses Atwood, of Georgetown, Massachusetts. The bill alleges that the complainant is, and for a long time previous to the grievances complained of was, the manufacturer and vendor of the medicine mentioned; that it is put up and

sold in glass bottles with twelve panel-shaped sides, on five of which in raised words and letters "Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass." are blown in the glass, each bottle containing about a pint, with a light yellow printed label pasted on the outside designating the many virtues of the medicine, and the manner in which it is to be taken; and stating that it is manufactured by Moses Atwood, Georgetown, Mass., and sold by his agents throughout the United States.

The bill also alleges that the bottles thus filled and labelled are put up in half-dozen packages with the same label on each package; that the medicine was first invented and put up for sale about twenty-five years ago by one Dr. Moses Atwood, formerly of Georgetown, Massachusetts, by whom, and his assigns and successors, it has been ever since sold "by the name, and in the manner, and with the trade-marks, label and description substantially the same as aforesaid;" that the complainant is the exclusive owner of the formula and recipe for making the medicine, and of the right of using the same name or designation, together with the trade-marks, labels, and good will of the business of making and selling the same; that large sales of medicine under that name and designation are made, amounting annually to twelve thousand bottles; that the defendants are manufacturing and selling at Portland, Me., and at other places within the United States, unknown to the complainant, an imitation of the medicine, with the same designation and labels, and put up in similar bottles, with the same, or nearly the same words raised on their sides, in fraud of the rights of the complainant and to its serious injury; that this imitation article is calculated and was intended to deceive purchasers, and to mislead them to use it instead of the genuine article manufactured by the complainant, and has had, and does have, that effect. The bill therefore prays for an injunction to restrain the defendants from affixing or applying the words "Atwood's Vegetable Physical Jaundice Bitters," or either of them, or any imitation thereof, to any medicine sold by them, or to place them on any bottles in which it is put up, and also from using any labels in imitation of those of the complainant. It also prays for an accounting of profits and for damages.

Among the defences interposed are these:

that Moses Atwood never claimed any trade-mark of the words used in connection with the medicine manufactured and sold by him; and assuming that he had claimed the words used as a trade-mark, and that the right to use them had been transferred to the assignors of the complainant, it was forfeited by the misrepresentation as to the manufacture of the medicine on the labels accompanying it, a misrepresentation continued by the complainant.

In the view we take of the case, it will not be necessary to consider the first defence mentioned, nor the second, so far as to determine whether the right to use the words mentioned as a trade-mark was forfeited absolutely by the assignors' misrepresentations as to the manufacture of the article. It is sufficient for the disposition of the case, that the misrepresentation has been continued by the complainant. A court of equity will extend no aid to sustain a claim to a trade-mark of an article, which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both of which particulars were originally circumstances to guide the purchaser of the medicine.

It is admitted that whatever value the medicine possesses was given to it by its original manufacturer, Moses Atwood. He lived in Georgetown, Massachusetts. He manufactured the medicine there. He sold it with the designation that it was his preparation, "Atwood's Vegetable Physical Jaundice Bitters," and was manufactured there by him. As the medicine was tried and proved to be useful, it was sought for under that designation, and that purchasers might not be misled, it was always accompanied with a label, showing by whom and at what place it was prepared. These statements were deemed important in promoting the use of the article and its sale, or they would not have been continued by the assignees of the original inventor. And yet they could not be used with any honest purpose when both statements had ceased to be true. It is not honest to state that a medicine is manufactured by Moses Atwood, of Georgetown, Massachusetts, when it is manufactured by the Manhattan Medicine Company in the City of New York.

Any one has an unquestionable right to affix to articles manufactured by him a mark or device not previously appropriated, to distinguish them

from articles of the same general character manufactured or sold by others. He may thus notify the public of the origin of the article and secure to himself the benefits of any particular excellence it may possess from the manner or materials of its manufacture. His trade-mark is both a sign of the quality of the article and an assurance to the public that it is the genuine product of his manufacture. It thus often becomes of great value to him, and in its exclusive use the court will protect him against attempts of others to pass off their products upon the public as his. This protection is afforded not only as a matter of justice to him, but to prevent imposition upon the public. *Manufacturing Company v. Trainer*, 101 U. S. 54.

The object of the trade-mark being to indicate, by its meaning or association, the origin or ownership of the article, it would seem that when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use; otherwise a deception would be practised upon the public and the very fraud accomplished, to prevent which courts of equity interfere to protect the exclusive right of the original manufacturer. If one affix to goods of his own manufacture signs or marks which indicate that they are the manufacture of others, he is deceiving the public and attempting to pass upon them goods as possessing a quality and merit which another's skill has given to similar articles, and which his own manufacture does not possess in the estimation of purchasers. To put forth a statement, therefore, in the form of a circular or label attached to an article, that it is manufactured in a particular place, by a person whose manufacture there had acquired a great reputation, when in fact it is manufactured by a different person at a different place, is a fraud upon the public which no court of equity will countenance.

This doctrine is illustrated and asserted in the case of *Leather Cloth Co. v. American Leather Cloth Co.*, which was elaborately considered by Lord Chancellor Westbury, and afterward in the House of Lords on appeal from his decree. 4 De Gex, Jones and Smith, 147, and 11 Clark's H. of L. Cas. 523.

In that case, an injunction was asked to restrain the defendant from using a trade-mark to designate leather cloth manufactured by it,

which trade-mark the complainant claimed to own. The article known as leather cloth was an American invention, and was originally manufactured by J. R. and C. P. Crockett, at Newark, New Jersey. Agents of theirs sold the article in England as "Crockett's Leather Cloth." Afterward a company was formed entitled "The Crockett International Leather Cloth Company," and the business previously carried on by the Crocketts was transferred to this company, which carried on business at Newark, in America, as a chartered company, and at West Ham, in England, as a partnership. In 1856, one Dodge took out a patent in England for tanning leather cloth and transferred it to this company. In 1857 the complainant company was incorporated, and the international company sold and assigned to it the business carried on at West Ham, together with the letters patent, and full authority to use the trade-mark which had been previously used by it in England. A small part of the leather cloth manufactured by the complainant company was tanned or patented. It however used a label which represented that the articles stamped with it were the goods of the Crockett International Leather Cloth Company; that they were manufactured by J. R. and C. P. Crockett; that they were tanned leather cloth; that they were patented by a patent obtained in 1856, and were made either in the United States or at West Ham, in England. Each of these statements or representations was untrue so far as they applied to the goods made and sold by the complainant.

The defendant having used on goods manufactured by it a mark having some resemblance to that used by the complainant, the latter brought suit to enjoin the use. Vice-Chancellor Wood granted the injunction, but on appeal to the lord chancellor the decree was reversed and the bill dismissed. In giving his decision the lord chancellor said that the exclusive right to use a trade-mark with respect to a vendible commodity is rightly called property; that the jurisdiction of the court in the protection of trade-marks rests upon property, and that the court interferes by injunction because that is the only mode by which property of that description can be effectually protected. But he added: "When the owner of the trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade-mark, or in the business connected with it, be himself guilty of any false or misleading representation; for if the plaintiff makes any material false statement in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a court of equity." And again: "Where a symbol or label, claimed as a trade-mark, is so constructed or worded as to make or contain a

distinct assertion which is false, I think no property can be claimed in it, or in other words, the right to the exclusive use of it cannot be maintained."

When the case reached the House of Lords the correctness of this doctrine was recognised by Lord Cranworth, who said that the justice of the principle no one could doubt; that it is founded in honesty and good sense, and rests on authority as well as on principle, although the decision of the House was placed on another ground.

The soundness of the doctrine declared by the lord chancellor has been recognized in numerous cases. Indeed, it is but an application of the common maxim that he who seeks equity must present himself in court with clean hands. If his case discloses fraud or deception or misrepresentation on his part, relief there will be denied.

Long before the case cited was before the courts, this doctrine was applied when protection was sought in the use of trade-marks. In *Pidding v. How*, 8 Sim. 477, which was before Vice-Chancellor Shadwell in 1837, it appeared that the complainant was engaged in selling a mixed tea, composed of different kinds of black tea, under the name of "Howqua's Mixture," in packages having on three of their sides a printed label with those words. The defendant having sold tea under the same name, and in packages with similar labels, the complainant applied for an injunction to restrain him from so doing. An *ex parte* injunction, granted in the first instance, was dissolved, it appearing that the complainant had made false statements to the public as to the teas of which his mixture was composed, and as to the mode in which they were procured. "It is a clear rule," said the vice-chancellor, "laid down by courts of equity, not to extend their protection to persons whose case is not founded in truth."

In *Perry v. Truefitt*, 6 Beav. 66, which was before Lord Langdale, Master of the Rolls, in 1842, a similar ruling was had. There it appeared that one Leathart had invented a mixture for the hair, the secret and recipe for mixing which he had conveyed to the plaintiff, a hair-dresser and perfumer, who gave to the composition the name of "Medicated Mexican Balm," and sold it as "Perry's Medicated Mexican Balm." The defendant, one Truefitt, a rival hair-dresser and perfumer, commenced selling a composition similar to that of plaintiff, in bottles with labels closely resembling those used by him. He designated his composition and sold it as "Truefitt's Medicated Mexican Balm." The plaintiff thereupon filed his bill, alleging that the name or designation of "Medicated Mexican Balm" had become of great value to him as his trade-mark, and seeking to restrain the defendant from its use. It appeared however that the plaintiff, in his advertisements to the public, had falsely set forth that the composition was "a highly concentrated ex-

tract from vegetable balsamic productions" of Mexico, and was prepared from "an original recipe of the learned J. F. VonBlumenbach, and was recently presented to the proprietor by a very near relation of that illustrious physiologist;" and the court therefore refused the injunction, the Master of the Rolls holding that in the face of such a misrepresentation, the court would not interpose in the first instance, citing with approval the decision in the case of *Pidding v. How*.

In a case in the Superior Court in the city of New York, *Petridge v. Wells*, 4 Abb. Pr. 144, this subject was very elaborately and ably treated by Chief Justice Duer. The plaintiff there had purchased a recipe for making a certain cosmetic, which he sold under the name of "The Balm of a Thousand Flowers." The defendants commenced the manufacture and sale of a similar article, which they called "The Balm of Ten Thousand Flowers." The complainant, claiming the name used by him as a trade-mark, brought suit to enjoin the defendants in the alleged infringement upon his rights. A temporary injunction was granted, but afterward, upon the coming in of the proofs, it was dissolved. It appeared that the main ingredients of the compound were oil, ashes and alcohol, and not an extract or distillation from flowers. Instead of being a balm, the compound was a soap. The court said it was evident that the name was given to it and used to deceive the public, to attract and impose upon purchasers; that no representation could be more material than that of the ingredients of a compound recommended and sold as a medicine: that there was none so likely to induce confidence in its use, and none, when false, that would more probably be attended with injurious consequences. And it also said: "Those who come into a court of equity, seeking equity, must come with pure hands and a pure conscience. If they claim relief against the frauds of others, they must themselves be free from the imputation. If the sales made by the plaintiff and his firm are effected, or sought to be, by misrepresentation and falsehood, they cannot be listened to when they complain that by the fraudulent rivalry of others, their own fraudulent profits are diminished. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to aid or sanction. To do so would be to forfeit its name and character." See also *Seabury v. Grovenor*, 14 Blatch. 262; *Hobbs v. Francais*, 19 How. Pr. 567; *Connell v. Reed*, 128 Mass. 477; *Palmer v. Harris*, 60 Penn. St. 156.

The doctrine enunciated in all these cases is founded in honesty and good sense; it rebukes fraud and encourages fair dealing with the public. In conformity with it, this case has no standing before a court of equity. The decree of the court below dismissing the bill must therefore be affirmed; and it is so ordered.—28 Albany Law Journal, 89.

The Legal News.

VOL. VI. AUGUST 18, 1883. No. 33.

APPEALS TO THE PRIVY COUNCIL FROM THE SUPREME COURT.

Some months ago (5 Legal News, p. 401), we noticed an expression of opinion by the Judicial Committee of the Privy Council, in *Bank of New Brunswick v. McLeod*, to the effect that the Committee would not recommend the exercise of the prerogative of the Crown to grant special leave to appeal "except in cases of general interest and importance, and then only when it manifestly appears that the Court below have erred in a matter of law." In a more recent case, *Canada Central Ry. Co. v. Murray*, in which judgment was rendered in May last, this rule has been reiterated. In the case mentioned, an application was made for leave to appeal from a judgment of the Supreme Court of Canada, but their lordships found that the questions raised involved no issue except one of fact, and they held that an appeal would not be allowed where the only issue raised is one of fact. The concluding observations of the Judicial Committee are deserving of attention:—"Their lordships are also desirous in this case to lay down the rule, that they will in future expect parties who are petitioning for leave to bring an appeal before this Board, to state succinctly, but fully, in their petition the grounds upon which they make that demand. They will certainly expect that parties will confine themselves in future to the petition, and will not wander into extraneous matter, such as the record and proceedings in this case, over which the Board until an appeal is permitted and brought, have no control whatever, and which they cannot accept on an *ex parte* statement which is an application of this kind is."

AMERICAN BAR ASSOCIATION.

The sixth annual meeting of the American Bar Association will be held at Saratoga Springs on the 22nd, 23rd and 24th days of August. Among the features of the meeting will be the address by the President of the Association, Alex. R. Lawton, of Georgia; a paper by R. G. Street, of Texas, on "How far considerations of Public Policy may enter into judicial decisions;" a paper by Simon Sterne, of New York, on "Slipshod and Corrupt Legislation, and the remedy;" the Annual Address by J. W. Stevenson, of Kentucky; a paper by S. E. Baldwin, of Connecticut, on "Preliminary Examinations in Criminal Proceedings, and a paper by J. M. Shirley, of New Hampshire, on "The Future of our Profession."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, September 20, 1882.

DORION, C. J., MONK, RAMSAY, CROSS, and BABY, JJ.

SAUVÉ (deft. below), Appellant, and BOILEAU (petr. below), Respondent.

Election of School Commissioner—Demand of Poll.

It is necessary that five electors should demand a poll, in the case of the election of a School Commissioner.

Where an election of School Commissioner has been held under circumstances which are unusual and which lead the Court to believe that there has been a surprise of the electors, and that they have been debarred from exercising their right to vote, the election will be annulled.

The judgment appealed from in this case was rendered by the Superior Court, district of Terrebonne, Bélanger, J., on the 14th of December, 1881, declaring the election of the appellant, Joseph Sauvé, to the office of School Commissioner to be null, and holding that Antoine Ladouceur was duly elected.

The complaint was that the appellant, Joseph Sauvé, had usurped the office of School Commissioner of the parish of St. Placide, to which Antoine Ladouceur was properly entitled, and the petitioner Boileau asked that Sauvé be dispossessed of the office in favor of Ladouceur. The question was whether Ladouceur or Sauvé had been legally elected. It was claimed that Ladouceur was duly elected School Commissioner at a meeting held at the church door of the parish. It appeared, however, that at the time the notice for this meeting at the church door was given, notice of another meeting for the same purpose was given, to take place at the residence of Ephrem Raby. An effort was made to combine the meetings, and have one at the church door, but some of the electors met at Raby's and Sauvé was elected, a poll demanded in favor of Ladouceur being refused by the chairman. The meeting at Raby's was called by C. Raby, the newly appointed Secretary-Treasurer of the Commissioners. The other meeting was called by one Leroux, who had ceased to be Secretary-Treasurer on the 7th

February preceding, when he was removed from office.

Pagnuelo, Q.C., for the appellant, submitted that the election of Sauvé could not be attacked by reason of defect in the title of the person who presided, when he was openly exercising his office. His title could not be attacked incidentally. It was also urged, among other reasons, that the respondent could not question the title of Raby, because he had acknowledged him as Secretary-Treasurer by paying taxes to him.

Champagne, for the respondent, contended that Leroux had not been legally removed from office, and even if his removal was legal, the appointment of C. Raby was illegal, not being made at a regular meeting. Further, even supposing the meeting held at C. Raby's had been lawfully convened, yet a poll was demanded by a sufficient number of electors, and was improperly refused. Three electors could demand a poll, and in this case a poll was demanded by five. The pretended election of Sauvé was therefore illegal, and the judgment maintaining the election of Ladouceur was correct.

Ramsay, J. This case arises out of misunderstandings and difficulties of a Municipal Council. We have not to decide on the merits of the disagreement, but whether the appellant, Joseph Sauvé, was duly elected a School Commissioner of the Parish of St. Placide, or whether he has usurped the office to which one Antoine Ladouceur was duly elected.

The suit began by a proceeding in the nature of a *quo warranto* promoted by the respondent, who declares himself an elector, and qualified to vote for School Commissioners, and setting forth that Antoine Ladouceur was duly qualified to be elected, and was elected.

Both the quality or capacity of the Respondent and of Antoine Ladouceur—one as elector and the other as being eligible for election—were expressly denied, and it may be well to dispose of these questions at once. It is argued that Respondent is only the *prête-nom* of two persons, G. Raymond and Damase Leroux, who themselves participated in the proceedings attacked, and because he recognized the validity of the proceedings in paying the Secretary-Treasurer, whose nomination as Secretary-Treasurer he now impeaches; that Raymond and Leroux have not paid their taxes, that La-

douceur was ineligible because neither he nor his proposers had paid their taxes.

I see no evidence to disqualify these parties. Those whose names are on the voters' list are entitled to vote unless it can be shown positively that they are subject to a disability. The evidence of this is on the party alleging the incapacity.

Substantially there is little difference as to the facts of the case. On the 7th February, 1881, it seems that there was a special meeting of the School Commissioners called to decide as to whether the Board should resolve to settle the claim of the former Secretary-Treasurer, Mr. Barnard. At that meeting circumstances came to the knowledge of the Commissioners which induced them to concur in a resolution to dismiss the then Secretary-Treasurer on the spot.

The resolution to dismiss the Secretary-Treasurer was adopted unanimously. It is unnecessary for us to form, much less to express any opinion as to whether this act of rigour was justifiable or not. It is sufficient to say that the dismissal was accomplished, and that the former Secretary-Treasurer fully understood that he was dismissed. That the Commissioners had the power so to deal with their officer appears to be beyond all doubt, according to law. C.S.L.C. 15, 60, § 4. Before the dismissal one Anthime Pilon was appointed Secretary-Treasurer *pro tempore*. Leroux, the former Secretary-Treasurer, then retired, and Pilon continued to take the minutes. Mr. St. Jacques, the Chairman of the School Commissioners, who did not approve of these proceedings, declared he would not sign the minutes, and withdrew, refusing to take any further part in the meeting. The remaining Commissioners then appointed one of themselves, Mr. H. Pilon, to act as Chairman in the absence of St. Jacques (sec. 58), and the meeting then adjourned till the 19th February. This would have been entirely within the powers derived from the common law, but it appears that the duty of the Commissioners was to proceed to the appointment of a Secretary-Treasurer, who should give security before acting. Another complication was created by the fact that the meeting of the 7th had taken place in the former Secretary, Leroux's house, and the Commissioners could not decently meet there again.

By the adjournment they had fixed no other place of meeting. The three remaining Commissioners agreed, however, to meet at the house of Cyprien Raby, and the chairman *pro tem.* and the secretary *pro tem.* sent Mr. St. Jacques and Mr. Lalonde notice of the adjournment, and that the sitting would be held at Raby's. Neither St. Jacques nor Lalonde attended; and it is contended that this is not a properly adjourned meeting, and that it is not a special one. If it was not a properly adjourned meeting, all that was done at it, in the absence of two of the Commissioners, was radically null. There would be no protection for the public if a portion of their representatives can bind them at hole and corner meetings, and it seems to me to be a dangerous irregularity to alter the place of meeting. We must not, however, sacrifice substance to form, void of any real interest. It is proved that Lalonde could not be present, and it is to be presumed that St. Jacques purposely abstained from attending, for he had a special notice to tell him where the meeting was to be held. Again, there is nothing in the law to declare a meeting to be absolutely null because there was no Secretary-Treasurer. It is true that the form indicates that the Secretary-Treasurer should sign the notice, and that is the usual course, but how were these Commissioners to act? The chairman abandoned his functions, and the secretary-treasurer was dismissed. Was the school municipality of St. Placide to become helpless? I think, therefore, the notice given by Antime Pilon was sufficient, that the adjourned meeting would be held at Raby's. If that meeting was lawfully held, then Mr. Raby was duly appointed to the vacant office of Secretary-Treasurer, and he was the proper person to sign the summons for the public meeting for the election of a Commissioner. In any case Mr. Damase Leroux had no authority, or color of right to call the meeting. The question, therefore, becomes narrowed down to this, whether the meeting at Raby's on the 4th July was regular, and whether it was fairly and honestly held. As to its regularity, it is maintained that it was not called by the officer qualified, Mr. Raby,—that even if he had a right to call the meeting a poll was regularly demanded, and refused on the ground that it was demanded by five electors,—that it only requires three

electors to demand a poll; that in effect five electors did demand a poll.

The appellant contends that Raby was duly appointed Secretary-Treasurer; that at any rate he held the office *de facto*; that five electors are required to demand a poll effectively, and that only four did, in effect, demand a poll.

The nomination of Raby has already been dealt with. The difficulty as to whether five or three electors are required to demand a poll arises in this way:—By Sect. 37, C. 15, C.S.L.C., it is provided: "Si le choix des dits commissaires d'école est contesté, trois des électeurs présents pourront demander un poll, lequel devra être tenu suivant les règles établies par la loi *alors en force* pour l'élection des conseillers municipaux."

The 41 V., c. 6, s. 29, then adds: "La section 37 du dit chap. 15 se terminera comme suit:

Et d'après le mode prescrit pour les élections des conseillers municipaux, *par les articles 308, 309, 310, 311, 312, 313, 314, 315, 317, 318, 319, 320, 321 and 325 du code municipal, lesquels sont déclarés faire partie du dit acte,*" etc.

The article 311 of the Municipal Code then formally declares that five electors must demand a poll, otherwise it is the duty of the President to declare the person elected who has the show of hands. This is of course directly contradictory to the provision of Sect. 37, C.S.L.C., and it comes to be a question whether a demand of three electors is sufficient. I think the evidence fails to establish that more than four electors demanded a poll. The official return so states the fact, and it is perfectly proved that this was the pretension of the presiding officer at the time. It was no afterthought. It was then for Respondent to prove that really five electors demanded a poll, and this I think he has failed to do, his testimony being contradicted in the most positive way. We are, therefore, obliged to decide the effect of Sect. 37, C.S.L.C. and art. 311 M.C.

It seems to me impossible to arrive at any other conclusion than this, that it requires five electors to demand a poll, whatever rule of interpretation we apply. First, it was evidently intended to assimilate the election of Commissioners to the election of Municipal Councillors. Second, the five are mentioned in an amendment made to a portion of the former act,

and which naturally over-rides the first enactment. And as a third reason the poll is a privilege or exception to the ordinary mode of election by show of hands, and therefore the presumption is in favour of the greater restriction. I think, then, that these objections are unfounded.

But another question arises, and that is whether in carrying out the law there has been good faith, or rather, I should say, whether owing to the contentions of the members of the council, rendered embarrassing by irregularities, there has not been what amounts to a surprise of the electors which has had really the effect of depriving them of their right to vote.

I am very far from wishing to impute to the contending parties the malice they readily attribute to one another. It is easy to understand how mistaken zeal influences people perfectly honest, and who are in an instant converted into blind partisans. This has probably been the case here. The majority of the Councillors felt naturally aggrieved at Mr. St. Jacques' conduct—they had excellent reason to be still more annoyed at Mr. Leroux—and they thought themselves justified in adopting every opportunity of upsetting their plans. So far they might be justified, but they could not be justified in dealing in such a way as to prevent the electors from exercising their right of vote. This they in effect did. The meeting at Raby's in July was unusual, and particularly inexpedient under the circumstances. Then, the want of a fifth to demand the poll was a quibble for the president of the Raby meeting knew perfectly well that a crowd of electors was in the vicinity, come expressly to vote. It was his duty, therefore, to have used a little discretion, and to have avoided the mystery in which he evidently intentionally indulged. I am therefore to reverse and that without costs. My reason for not allowing costs is that which formerly prevailed in Parliament. A contest of this sort is *pro bono publico*, if not malicious; and in this case I think there was probable cause for the institution of these proceedings and for the defence.

The judgment of the Court is as follows:—

“La Cour, etc.

“Considérant que l'assemblée tenue à la porte de l'église de la paroisse de St. Placide, le 4

juillet 1881, n'a pas été dûment convoquée par aucune personne autorisée à ce faire, et, qu'en conséquence, la prétendue élection du nommé Antoine Ladouceur, pour agir en qualité de Commissaire d'Ecoles pour la dite paroisse, est nulle et illégale;

“Considérant que l'assemblée tenue dans la maison de Ephrem Raby, le même jour de la même année, a été dûment convoquée, et que les électeurs ont été induits en erreur par le fait que les deux assemblées ont été convoquées simultanément, et pour le même but, et ont été, en conséquence de cette erreur, privés de l'exercice de leur droit de voter à l'élection d'un Commissaire d'Ecoles;

“Et considérant que l'élection de Joseph Sauvé comme Commissaire d'Ecoles pour la dite paroisse de St. Placide a été faite par surprise, et en violation des règles de l'équité et de la bonne foi, qui doivent être observées en semblable cas;

“Et considérant qu'il y a erreur dans le jugement rendu en chambre à Ste. Scholastique 14e jour de décembre 1881, qui déclare le dit Antoine Ladouceur dûment élu, renverse le dit jugement;

“Et prononçant le jugement que le dit juge aurait dû rendre, déclare l'élection du dit Antoine Ladouceur et du dit Joseph Sauvé irrégulière, nulle, et de nul effet, et la casse et met à néant, chaque partie payant ses frais, tant en cette cour que dans la cour de première instance; et en outre, cette cour, en vertu des pouvoirs qui lui sont conférés, par acte passé dans la 44e, et 45e année du règne de Sa Majesté la Reine Victoria, ch. 19, ordonne qu'une élection ait lieu samedi, le 7me jour d'octobre prochain, étant le quinzième jour juridique, à compter de la date de ce jugement, suivant la loi pour élire un Commissaire d'Ecoles pour la dite paroisse de St. Placide, pour remplacer le dit Sauvé dont l'élection est annulée, et que Zotique Lalonde, écuyer, maire de la municipalité de la dite paroisse de St. Placide, soit nommé, ainsi qu'il l'est par le présent jugement, pour présider à la dite élection.”

Judgment reversed.

Pagnuelo & St. Jean, for appellant.

Prévost & Champagne, for respondent.

THE LEGAL NEWS.

COURT OF QUEEN'S BENCH.

(In Chambers.)

MONTREAL, July 14, 1883.

Ex parte WILLIAM CAMPBELL PHELAN, Petitioner
for Habeas Corpus.

Extradition—Procedure—Evidence.

Held, 1st. That since the Imperial Order-in-Council of 28th December, 1882, (published in the Canada Gazette of the 3rd March, 1883) the operation of the Imperial Extradition Act of 1870 has been suspended in Canada quoad the extradition of fugitive offenders from the United States, and the Dominion Act, 40 Victoria, chapter 25, is applicable in such case, to the extent, at least, of the extradition arrangement in force with that country.

2nd. That alleged irregularity in the proceedings for his arrest, cannot on an application for Habeas Corpus avail a prisoner committed for extradition. It is sufficient that being under arrest before proper authority, a case has been made out against him sufficient to justify his commitment.

3rd. That an affidavit sworn to before a commissioner of the United States, proved to be a magistrate having authority in the matter according to the law where taken, may be received, if properly proved, as evidence against the prisoner on proceedings for extradition.

4th. That, provided there has been adduced legal evidence applicable to the case, and a prisoner has thereon been committed for extradition, a Judge on an application for Habeas Corpus will not be disposed to weigh or appreciate that evidence with a view to giving the prisoner the benefit of a doubt as to its preponderance.

CROSS, J. The prisoner is brought before me on an application for Habeas Corpus, to enquire into the legality of his commitment for extradition to the United States of America under a warrant issued by the Chief Justice of this Court, which, after setting out the offence charged, adjudges the evidence adduced here "sufficient according to the laws of the Dominion of Canada, to justify the apprehension and commitment for trial of the said William Campbell Phelan for the said crime in case the same had been committed in the Province of Quebec, Dominion of Canada," and it proceeds: "Forasmuch as I have determined that the

"said William Campbell Phelan should be "surrendered in pursuance of the said Act, he "is committed to gaol until he shall be thence "surrendered pursuant to the provisions of the "said treaty between Her Majesty and the "United States of America, and the Act of the "Dominion Parliament in force, and known as "'The Extradition Act, 1877,' or until discharged according to law."

It is admitted that the crime with which the prisoner is charged is one for which the surrender of a fugitive criminal could be claimed in virtue of the Treaty between Great Britain and the United States, but it is contended that no case for extradition has been made out against him.

The applicant by his petition raises the following objections to the validity of his commitment:

1st. That the manner of the prisoner's arrest was illegal, the original warrant of arrest and the commitment for preliminary examination being irregular.

2nd. That all the proceedings leading up to the commitment, and the final commitment itself are null and void, inasmuch as they are based upon the Dominion Act, 40 Vict. C. 25, which is not in force in Canada, quoad the extradition of fugitive offenders from the United States.

3rd. That the documentary evidence in the case is illegal and inadmissible, and neither that nor the oral evidence are sufficient to justify the committal for extradition.

4th. That the prisoner should not be committed for extradition, inasmuch as the prosecution have failed to establish that, if extradited, he could not be detained or tried in the United States for any offence prior to his surrender other than that on which the surrender is grounded.

It will thus be seen that the petitioner invokes the insufficiency of the evidence as well as alleged illegality of the proceedings.

It has been much disputed whether a judge should on Habeas Corpus in a like case examine the sufficiency of the evidence. While I hold that he may decide as to the legality or admissibility of any particular evidence adduced, or examine whether there may not be an entire absence of evidence on any essential point, I think he should refrain from such

criticism as merely called in question the weight or preponderance of proof, conceding that its appreciation should be accepted as found by the judge making the preliminary enquiry.

It was contended that Weber, the party who claimed to have been defrauded by the passing of the counterfeit money, should have been produced as a witness, but his affidavit and the evidence of the detective McIlrath identified the prisoner sufficiently. Objections were further made that Weber's affidavit was taken, *ex parte*, after the arrest and was sworn to before a commissioner in place of a Justice of the peace. These are answered by the rulings in the cases of *Martin*, U. C. L. J. for 1868, p. 124, and of *Counhays* 8 L.R., Q.B. p. 410. The affidavit is only required to be made before a party authorized to receive it, not necessarily by a Justice of Peace, and it is proved that Henry H. Hallett was vested with the powers of a Magistrate and was duly authorized to take this evidence. I must hold it well taken.

The next objection is as to the finding of the Grand Jury. There would appear to be sufficient evidence without this document. No necessity therefore exists for a formal ruling as to its admissibility. Judge Ramsay in the case of *Rosenbaum*, 18 L. C. J. 260, seemed to have inclined to consider it not legal evidence, and excluded it, I think, rather on the principle that it was the safest course, than from any very decided opinion that it was wholly inadmissible; and in the case of *Regina v. Brown*, 31 U. C. C. P. R., p. 484, it was held admissible by Chief Justice Wilson (confirming Judge Armour's opinion and also as auxiliary evidence by Mr. Justice Galt. I myself lean to the opinion of its admissibility on the ground that it is a statement on oath, that is, on the oath of the jury who held the inquest, although hearsay as regards the evidence taken before them, and also on the ground that it is the finding of a competent foreign tribunal having jurisdiction over the subject matter with which they dealt. The finding of a grand jury in this Province would of course be a full justification for committing and putting the accused party on his trial (32-33 Vic. cap. 30, sec. 4 and 5. It is not disputed that the document is sufficiently authenticated.

These objections being disposed of I come to deal with the law of the case.

As to the pretended irregularity of the arrest, the party accused was in custody before a tribunal competent to inquire into the demand for his extradition, witnesses were examined in his presence and cross-examined by him, and after a protracted enquiry he was committed for extradition. It is not competent for him to pretend that he was wrongfully taken into custody. It is enough that being in custody a sufficient case was made out against him to justify his commitment for extradition. It was so held in *Martin's* case, U. C. L. J. for 1868, p. 124.

As to the form of the commitment: It is the one appended to the Dominion Statute of 1877, and ought to be sufficient if that statute be in force, although for my own part I do not think it well framed or well conceived to carry out the spirit of the law. Had it not been made a statutory form I should scarcely have been disposed to hold a committal good that did not contain a declaration by the committing judge, that the evidence adduced was sufficient according to the laws of the Dominion of Canada, or the Province thereof where he was committed, to justify the apprehension and committal of the prisoner for the crime of which he stood accused. I am not prepared to say a commitment would of necessity have to be declared bad, although it invoked as part of the judge's authority a statute which was not in force, or even adopted a form given in that statute, provided it otherwise contained all the essential averments to meet the necessity of the case according to the treaty and the law of extradition, then actually effective. In such case I think the reference to a statute not in force might be considered mere surplusage, but I make no express ruling on this point, I do not consider it necessary.

It is urged that the Chief Justice exceeded his authority by including in the commitment the words following: "And forasmuch as I have determined that the said William Campbell Phelan should be surrendered in pursuance of the said Act for the causes aforesaid," and the case of *Zink*, 6 Q.L.R., p. 260, was cited to show that the committing Judge has no power to decide that the extradition should take place. I would have so held in this case were it not that I find that the commitment in this respect follows the form appended to the Dominion

Extradition Statute of 1877, which was put into force since that case was decided.

A further argument is made for the prisoner based on Section 4 of the Dominion Extradition Act of 1877, which reads as follows: "In the case of any foreign state with which there is at or after the time this Act comes into force, an extradition arrangement, this Act shall apply during the continuance of such arrangement. Provided that the operation of the Act of the Parliament of the United Kingdom passed in the year of Our Lord one thousand eight hundred and seventy, and entitled: *An Act for amending the law relating to the Extradition of Criminals*," shall have ceased or been suspended within Canada in the case of that state."

Previous to the 28th Dec. 1882, the necessary measures had not been adopted to suspend the operation of the Imperial Extradition Act of 1870, and to bring into force the Dominion Extradition Act of 1877, to which end provision had been made in these two Acts. By Imperial order-in-council of that date, published in the *Canada Gazette* of the 3rd March 1883, the Imperial Act of 1870 was suspended within the Dominion of Canada so far as it related to any foreign state in the case of which it then applied. It did then apply and had been acted upon with regard to the United States, but independently of certain limitations and restrictions to which Her Majesty's Government desired it should be subjected, and which were provided by treaty or otherwise in the case of other governments.

The suspension of the Imperial Act of 1870, therefore, was operated by the order in council of date the 28th Dec., 1882. But it is argued that subsection 3 of sec. 4 of the Canadian Act of 1877 shows that the application of the Imperial Act of 1870 to the United States in virtue of section 27 was a conditional and qualified one, the Act having been applied so that the Canadian Act 31 Vic. chap. 94 should form part of it, and hence the Canadian Act of 1877 could only be applied to the United States by the Governor General's Order in Council subject to the same conditions and qualifications in virtue of section 27. But section 27, after repealing previous legislation, provides that the Act shall be in force with the exception of anything it contained inconsistent with the treaties to

which it referred, in the same manner as if an Order in Council referring to such Treaties had been made, and had directed that every law or order once in force in any British possession formed part of the Act. It follows that the Statute of 1870 came in force as regards the United States without any Order in Council, but that restrictions and limitations or additional provisions beyond what was contained in the Treaty with the United States were not in force as regards that country.

Therefore the extended schedule of crimes attached to that statute, and the conditions therein stated which by orders in Council came to be applied in the case of Treaties with other States, did not apply to the United States and could not be applied by any Canadian order in Council. Sub-Section 3 of section 4 of the Dominion Act of 1877 imposed it as a duty on the Dominion Governor in Council, in cases where the Imperial Act of 1870 had been or should be applied with restrictions and limitations, to direct by their order like restrictions and limitations. This explains the exception made of the United States in the despatch of Lord Derby to the Governor General Lord Lorne, of date the 7th February, 1883. The Imperial Act of 1870 never having been with its restrictions and limitations applied to the United States, was only in force as regards them to the extent of the actual Treaty stipulations, and needed no Canadian Order in Council to put it in force as regards restrictions and limitations, because they did not apply.

I have only to add that the Canadian Act 31 Vic. chap. 94, was repealed by the Dominion Act of 1877, 40 Vic. chap. 25, coming into force.

I think a fair case has been made out for the prisoner's extradition, and he has failed to show any illegality in his detention or commitment. I order him to be remanded for extradition according to the exigency of the commitment by which he is held. In my opinion Treaty regulations between States should be executed in good faith in a liberal spirit with a disposition to facilitate the obtaining of justice.

The order of commitment for extradition is confirmed.

C. P. Davidson, Q.C., and *Selkirk Cross* for the United States Government.

E. W. P. Guerin and *Eugene Lafleur* for the Petitioner.

ENGLISH CRIMINAL LAW.

Open and public place.—A railway carriage, while on its journey, is within the definition of "an open and public place, to which the public have or are permitted to have access," in a statute forbidding gaming in such places.—*Langrish v. Archer*, L. R., 10 Q. B. D. 44.

Rape.—The statute 38 & 39 Vict. ch. 94, sec. 4, which enacts that "whosoever shall unlawfully and carnally know and abuse any girl being above the age of twelve and under the age of thirteen years, whether with or without her consent, shall be guilty of a misdemeanor," etc., does not operate to prevent a conviction for felony, under 24 and 25 Vict. ch. 100, sec. 48, of a person committing a rape upon a girl between those ages.—*Reg. v. Ratcliff*, 10 Q. B. D. 37.

GENERAL NOTES.

The following is probably intended as a satire upon the "small type" conditions of which common carriers are so fond:—

"A few Saturdays ago a Philadelphia fish dealer departed for a railroad station a few miles out, to spend Sunday with some friends. After the cars had started he found on looking at his return ticket that 'in consideration of the reduced rates,' etc., the ticket was good only till the day following; so on his return, Monday, he had to buy another ticket to come home on. A day or so afterward a leading official of the company bought a couple of early shad of him. They were delivered, and on opening the bundle was found a card stating that 'in consideration of the low price charged, the shad would not be good after two hours.' The fish had to be thrown away, and that official has been in a brown study ever since."

THE MONTREAL POLICE FORCE.—Thirty years ago there were but two police stations, the population being about 60,000, whereas now there are eleven stations for a population of about 150,000. The following table will give an idea of the comparative strength of the force for the last thirty years:—

Year.	Chiefs.	Sub-Chiefs.	Sergeants.	Detectives.	Men.	Appropriation.
1854.....	1	2	4	2	75	\$30,000
1856.....	1	2	4	2	100	36,000
1862.....	1	2	6	2	125	48,000
1866.....	1	2	12	4	125	60,000
1870.....	1	4	16	4	125	78,200
1872.....	1	4	20	4	150	100,128
1876.....	2	2	24	6	162	134,500
1880.....	2	2	20	6	162	131,289
1882.....	1	2	33	8	206	160,000

The large increase of expenditure is due chiefly to the expense of building or renting and maintaining station houses rather than for the pay of policemen, whose numbers have not increased in proportion; but that the ratio of police protection to population has improved and is nearer to what it should be, viz., at least 1 policeman to 500 people, will be gathered from the following comparisons:—

	Population.	Police.	Ratio.
1854.....	60,000	75	1 to 800
1870.....	108,000	125	1 to 864
1880.....	143,000	168	1 to 851
1883.....	150,000	215	1 to 697

The annual revenue from fines in the Recorder's Court may be regarded as a criterion of public morality; these have lately fallen off in a marked degree, as a few figures taken at random from the City Treasurer's books show:—

1886.....	\$14,050
1867.....	17,328
1870.....	15,442
1872.....	18,027
1876.....	15,998
1881.....	12,665

The death of Mr. James Cockburn, Q.C., one of the commissioners appointed to consolidate the Statutes of Canada, occurred on the 14th August.

The *Canada Gazette* contains the appointment of William Twining, Esq., of Halifax, barrister-at-law, to be Marshal of the Court of Vice-Admiralty at Halifax, vice Joseph Bell, deceased.

The cat had a good friend in Mrs. Ellen M. Gifford, of Boston. In her will she left \$25,000 to establish a home for friendless or disabled cats. But the will, it is stated, is to be disputed on the ground that there is presumptive evidence of insanity in any person who will "die and endow a college for a cat."

A solicitor complains, in the columns of the *Law Times*, that "solicitors were forgotten in the festival tribute" to Mr. Benjamin, although they are the persons "whose patronage made both bench and bar." The *Law Times* answers that "solicitors cannot secure to counsel that eminence which is the prize alone of learning and ability to which solicitors contribute nothing."

A new system of postal notes is to come into operation in the United States on September 3, by which the sender can transmit any sum from one cent to five dollars. The *New York Tribune* illustrates the convenience of the new arrangement by stating that "a lady living out of town who wants to send \$3.79 to a drygoods store in New York will hand that sum, and three cents fee, to the postmaster. He will give her an order with the figure three punched in the dollar column, the figure seven in the column of dimes, and the figure nine in the column of cents. This is simple and easy, and offers no chance for fraud."

The Legal News.

VOL. VI. AUGUST 25, 1883. No. 34.

THE MACKONCHIE CASE.

The London *Law Times* reviews as follows the remarkable litigation arising from the eccentric practices of the Rev. Mr. Mackonochie: "The history of the litigation which culminated last week in the sentence of deprivation against Mr. Mackonochie, deserves to be recorded as an interesting example of the extraordinary speed with which 'swift-footed justice' pursues an ecclesiastical offender. The first suit against Mr. Mackonochie came before the Arches Court of Canterbury by letter of request from the Bishop of London to the then Dean of Arches (Dr. Lushington), in 1867, when Sir Robert Phillimore, on behalf of the defendant, opposed the admission of the articles. The articles were reformed as directed by the Court, and in 1868 the case was heard before Sir R. Phillimore, who had succeeded Dr. Lushington. After a hearing extending over sixteen days, the learned judge, in a judgment which occupies 130 pages in the *Law Reports*, found that Mr. Mackonochie had offended against the ecclesiastical law in two out of four points then charged against him. He admonished the reverend gentleman to abstain from the illegal practices. The promoter appealed against the decision as regarded the two points on which Sir R. Phillimore had absolved the defendant; and in December of the same year the Judicial Committee held that the defendant had offended against the law in those points also, and he was admonished to abstain from them. In 1869 the Judicial Committee were applied to for an order to enforce compliance with the monition, and the Court held that, as to one practice, the monition had been disobeyed, and further admonished the defendant to abstain therefrom for the future. In 1870 a motion was again made to the Privy Council to enforce obedience to the monition. The Court found that the defendant had disobeyed the monition, and suspended him *ab officio et beneficio* for three months. Here ended the first suit. In 1874 a second suit was instituted against Mr. Mackonochie for a variety of offences. The charges

were held to be established, and the defendant was suspended *ab officio* for six weeks, and was admonished to desist from the like practices for the future. In March, 1878, Lord Penzance, then Dean of Arches, declared that Mr. Mackonochie had disobeyed this monition, and granted a further monition against him, and in the following June Mr. Mackonochie was suspended *ab officio et beneficio* for three years for continued disobedience. Mr. Mackonochie then obtained from the Queen's Bench Division a writ of prohibition to restrain Lord Penzance from enforcing the sentence of suspension, but this decision was subsequently reversed by a majority of the Court of Appeal. In the meantime, a new suit was instituted, praying for a sentence of deprivation against Mr. Mackonochie. Lord Penzance refused to grant a deprivation, on the ground that, while the previous sentence was still subsisting, it would not be consistent with the maintenance of the authority of the Court to pass a fresh sentence. The Judicial Committee reversed this decision, and remitted the case to the Court below to decree such censure or punishment as it might think fit, and on Saturday last Lord Penzance pronounced sentence of deprivation. It would probably be unsafe to say that the end of this vista of litigation has yet been reached."

REGISTRAR'S FEES IN NEW YORK.

Our enterprising neighbours usually stimulate us by their example, but in some respects they are slow in the task of uprooting evil growths. The New York *Herald* has been attacking the system of searches of real estate titles in the city of New York. We avail ourselves of the following summary in our contemporary the *Albany Law Journal*:—"The New York *Herald* of the 3rd inst. contained a very interesting article on searches of real estate titles in the city of New York. There can be no doubt that these searches are of appalling expense. There are in the register's office 3,500 volumes of records, and they are increasing at the rate of 300 a year. Last year there were nearly 10,000 deeds and more than 10,000 mortgages recorded. The necessary and reasonable expense of a proper search must be very large, and there is perhaps no help for it; but it would seem that the official fees are rather too

large. The *Herald* estimates that last year the register received \$340,000, and the county clerk \$300,000. Every practitioner knows that these enormous sums do not enrich these officials alone, and he knows too that to expedite a search he must bleed at every pore. The *Herald's* remedy for the evil is the following, which we submit for the reflection of our readers: 'The minds of practical men in various places have been independently drawn to this problem, and it has been found by all or nearly all of them who have stated their conclusions that the remedy for this great evil is to arrange the indices of the conveyances and mortgages upon a geographical basis, and not to have a name index at all (except for judgments); to make it a locality index, so that a buyer or lender desiring to know all the deeds and mortgages and liens on record affecting a particular house and lot can turn first to a ward and block map, something like the ward and block maps in the tax office of this city, and there identify by its number the parcel he is searching against, and then turn to another volume which is numbered and paged to correspond with the ward and lot number, and find in that volume a page devoted to that particular lot, and on that page, in regular order, each occupying but one line, find every deed, mortgage and lien affecting that lot properly noted; then it will be a brief and easy labor to examine the specific volumes of records referred to.' The above is precisely the system introduced nearly twenty years ago in the Province of Quebec.

THE RETIREMENT OF MR. BENJAMIN.

The withdrawal of this distinguished advocate from active work, in consequence of ill-health, has already been noticed. The *Times* refers to the banquet which was given to the retiring barrister, in the hall of the Inner Temple, on Saturday evening, June 20, as an almost unique event. Though liberal in its hospitality, the *Times* says "the English bar is not prone to go out of its way to honor even its most illustrious members; and to pay this mark of respect to one who had not entered it by the usual gates, who had come late in life to England to repair his shattered fortunes and to join a profession which has all sorts of portals and passwords calculated, if not intended, to exclude outsiders,

is a rare event, and is, in fact, without a parallel in the long history of the bar. It is the strange and brilliant ending of a strange professional career. The attendance of the chief judges and of upward of 200 members of the English bar shows that Mr. Benjamin has, in his comparatively brief career here, won the esteem and respect of men from whom so often in forensic contests he must have borne away the prize."

The following notice of his career, from the same journal, will be read with interest:—

"On Saturday little was said as to the element of romance in Mr. Benjamin's career, which is wholly wanting in the commonplace histories of most successful lawyers. But it formed a background of interest to the proceedings. In the brief speech in which, with feeling and tact, Mr. Benjamin acknowledged the warmth of his reception, he stated that he had retired from practice just as he had completed the fiftieth year of his professional life. Into that half century how much variety, what diversity of incident, experience, and scene have been crowded! If Mr. Benjamin writes his autobiography, as it is to be hoped he will, what materials for a stirring narrative he may draw from his memory. When some of the judges who had come to do him honor were children, he was already conspicuous at the New Orleans bar. His earliest published legal work, a digest of the reported cases of the Louisiana courts, is dated as far back as 1834, and his published arguments in important commercial cases, such as Lockett against the Merchants' Insurance Company, made him known as long ago as 1840 throughout the Union as an admirable lawyer. In the Senate he was equally successful as a powerful and dexterous debater. He attained distinction as a legal reasoner before the Supreme Court at Washington, a tribunal which has always preserved a high forensic standard. For some time before the outbreak of the civil war called him to play a still more conspicuous part, he was sought after wherever acumen and learning were needed; and one of the greatest of his forensic efforts was his argument before the Federal District Court of California in regard to an important mining claim—The United States against Castilleros. Of the share which he took in the struggle between the North and the South, it is enough to say that he showed no deficiency in boldness or skill,

and that the disasters which be-fell his cause were not attributable to any lack of energy on his part. When all was lost—when fortune had pronounced her last word against the Confederate arms—Mr. Benjamin came to England to begin in English courts the practice of the legal profession.

"The experiment might well seem foolhardy and hopeless even in the case of a man of Mr. Benjamin's energy and ability. He was pretty well advanced in years. His professional antecedents were not obvious preparations for success here. He had not been trained as a lawyer in one of the States of the Union in which the common law, with all its incidents, had taken root. He was not a Massachusetts or Pennsylvanian lawyer, accustomed to handle English authorities and to apply English rules of procedure. He was trained in Louisiana, the jurisprudence of which was formed of successive layers of Roman, French and Spanish law, and the courts of which were accustomed, when the States codes afforded no guide, to go in search of general principles to Roman, French, or Spanish authorities. Probably this apparent disadvantage was an advantage in disguise. However great the practical inconvenience of such a state of legal confusion, experience in such a forum was calculated to train lawyers who were more than mere tradesmen and who possessed wide legal knowledge. In this school Mr. Benjamin might well acquire that familiarity with and mastery over general principles which was the greatest of his gifts as an advocate. It was not an accident that Edward Livingston, the first American lawyer to direct attention to the subject of legal reform, began his work in that State. Nor was it a fact of no consequence that Mr. Benjamin received his legal training in circumstances in which it was essential to attain a familiarity with general jurisprudence. When he arrived in this country the fame of his ability had preceded him, and sympathy with him, as a political exile and the representative of a lost cause, smoothed his path. The late Lord Justice Turner, Lord Hatherly, and Sir Fitzroy Kelly bestirred themselves to procure for him a dispensation from the necessity of undergoing the usual period of probation before being called to the bar. Eminent firms of solicitors in Liverpool and elsewhere rallied round him. The publication

of his book on the Law of Sale advanced his professional fortunes; and he rapidly rose in favour until it became customary to retain him as a matter of course in all important cases before the Court of Appeals in the House of Lords. He had attained to an eminent position when his medical advisers warned him that he must no longer share in the excitement and tumult of forensic contests, and he decided, much to the regret of his brethren, to retire from his profession."

LEGISLATION IN ENGLAND.

Parliament now sits, not only during the winter, but all summer through, and apparently not even the autumnal shooting season is to be held sacred; yet the quantity of actual work accomplished is not prodigious. The present condition of things has prompted an effort to remedy the evil, and the House of Commons is in future to do a considerable part of its work, or at all events of its talking, in sections. Mr. Gladstone, at the Lord Mayor's Banquet, Aug. 8, referred to the innovation in the following terms:—

"One word on the House of Commons itself. Do what we may and labor as we may—freely as members of that assembly spend their powers and an amount of exertion never equalled, so far as I know, either in any former period or in any other country, for the benefit of the land to which they belong—yet they still seem as if they were engaged in almost hopeless effort in the multitude of demands that arise from every quarter, while the multiplication of interests of this vast and still extending Empire appears to defy the very best efforts they can make. But we have this year entered upon the first trial of an experiment of the utmost interest. That experiment is known under the name of the institution of what are called Grand Committees, by which the House of Commons endeavors to multiply itself for practical purposes with a judicious division of labor, applying to portions of its work for which a part of its members are proficient the energies of that part alone, and leaving the rest free for undertaking though perhaps not less important, yet separate purposes. I earnestly hope that the secret of self-multiplication, which has been largely used in other lands, may be found effectual here, where

undoubtedly the necessity for its use is far more urgent than in any other country on the globe, for there is no country on the globe which has undertaken so much; there never has been a country on the globe on which the cares of Empire have lain so heavily. But, on the other hand, there never has been a people, as I believe, more richly endowed with the energies necessary for the discharge of those duties, or more resolutely determined that, as far as the full disposal of their energies enable them, they will not fail in the fulfilment of the task which the dispensation of Providence appears to have committed to their hands. I hope that the people of this country will watch with far greater interest than ever the present work of the House of Commons. Important as particular subjects of legislation may be, there is no one subject perhaps so important as the condition of that great organ by which the bulk and mass of your work must be done, if it is to be done at all. The present Government have conceived the hope that by this secret of the division of labor and division of force, it may be possible to overtake the long arrears which for so considerable a time have done some discredit to the history of this country, and to keep the efforts of Parliament more abreast of the wants of the nation. I commend that subject to the reflection of every intelligent Englishman, because I am confident that after all this country is in the strictest sense a self-governing country, with its ancient institutions rooted in the heart and mind and in the attachment of the whole body of the people, irrespective of class and condition and sect and party. Yet in the main it is from the nation itself that the final decisive impulse arises, by means of which the great works that have been accomplished in legislation and Government have been carried onwards from their inception to their final consummation."

HUSBAND AND WIFE.

The Court of Appeal were greatly exercised in their minds on Friday by the decision of Mr. Justice Chitty in the case to which we drew attention in our last number, with regard to the rights of a married woman over a house settled to her separate use. The case is, with a somewhat excessive delicacy, reported in the *Times* of last Saturday, under the no-name of—v.

—, which is not a very convenient designation, and has been confined hitherto to matrimonial cases in which the details were unfit for publication. However, the real name is given in newspapers of less refinement as *Symonds v. Hallett*, and, as it is likely to be a leading case, it is just as well it should not remain anonymous. Lord Justice Cotton pointed out, as we did, that, "if Mr. Justice Chitty's decision was sound, it would enable every married woman who had a house of her own under the Married Women's Property Act, to turn her husband out of it and apply to the court to restrain him from entering it." The Master of the Rolls, with a singular forgetfulness of the manner in which nearly all the most important questions which come before the Chancery Division are decided, asked "whether the court could be expected, upon an interlocutory application of this sort, to decide a question which might have the effect of altering the whole social life of England." In the result, however, they did what they could hardly help doing, as the law on the subject was settled more than forty years ago, and had been acted on ever since, and confirmed the decision of Mr. Justice Chitty. But they carefully guarded themselves from laying down any general principle that a married woman could turn her husband out of her house and keep him out. Surely all this scrupulosity is ill-founded. A man can turn his wife out of his house, and her only remedy is that precarious and scandalous one of a suit for restitution of conjugal rights. Why should not a woman have an equal right? The Vice-Chancellor of England, in 1840, laid it down in a precisely similar case (*Green v. Green*, 5 Hare, 400) that the "court had only to consider whether a trust for the separate use of the wife was created. There was nothing unlawful in the settlement, and he saw nothing to prevent the Court from protecting the interests of the parties under it. If the injunction had the effect attributed to it, viz., of operating as a divorce *a mens et thoro*, a question which he could not determine, the husband would not be without his remedy in the Ecclesiastical Court." Sir Lancelot Shadwell was not a person careless of the results of legal decisions, but he knew that his business was to decide according to law and equity, and he did decide accordingly. If his decision was right (and it was practically approved of by

the Queen's Bench in *Allen v. Walker*, L. Rep. 5 Ex. 187, in 1879, by Martin, Channell and Cleasby, BB.), in a case in which the separate use was created by the parties in "derogation of the common law," *a fortiori* must it be right now when the separate use is made a necessary incident by the express declaration of the Legislature in a statute which has abrogated the common law. Nor can the fact that the statute has extended the rule of law from a few to a large number of cases affect the justice of the rule. In actual life there is not the least danger of the right being exercised in cases where it is not right that it should be exercised. Married women are not so anxious to drive away their husbands without cause as alarmist politicians seem to think, and in cases like that before the court it is eminently desirable that the husband should be treated in fact, as he is in law, as a stranger to his wife's separate property. At all events, the decision of the court may be taken to have overruled its *obiter dicta*, and carefully as each member of it guarded himself against laying down any general rule, yet the general rule is necessarily implied in, and forms, the only *ratio decidendi* of the particular decision.—*London Law Times*.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, September 27, 1882.

DORION, C. J., MONK, RAMSAY, TESSIER, CROSS, JJ.
REGINA V. SUPRANI.

Receiving stolen goods—Continued offence.

The prisoner was indicted for feloniously receiving stolen goods, on a date stated in the indictment, and it was proved that the receiving of the property described extended over a considerable period, exceeding six months. Held, that the Crown was not bound to elect on which of the receivings it was intended to proceed against the accused.

The defendant, Suprani, having been convicted of feloniously receiving stolen goods, the following Case was reserved by the presiding Judge, Sir A. A. Dorion, C. J.:—

"The prisoner was tried before me at the Court of Queen's Bench, at Montreal (Crown side), on the 7th day of June instant, for having, on the 26th day of April, 1882, feloniously received stolen goods.

"The indictment is as follows, to wit:—

"The jurors for Our Lady the Queen, upon their oath, present that Jean Suprani and Marie Granelli, on the 26th day of April, in the year of our Lord, 1882, at the City of Montreal, in the District of Montreal, 188 3-12 dozen of silk handkerchiefs, 1 7-12 dozen of kid gloves, the whole of the value of \$2,000, of the goods and chattels of Leslie James Skelton and Frederick Charles Skelton, partners in trade, before then feloniously stolen, feloniously did receive and have (they the said Jean Suprani and Marie Granelli, at the time when they so received the said goods and chattels as aforesaid, then well knowing the same to have been feloniously stolen).

"At the trial, the Crown proved that for a long period, extending from the latter part of the year 1880 to the 26th day of March, 1882, John Charles Verity, a clerk in the employ of Leslie James Skelton and Frederick Charles Skelton, doing business in Montreal under the name of Skelton Brothers, had, from time to time, stolen from his employers the handkerchiefs and part of the gloves mentioned in the indictment, and had sold them to the prisoner at from one-fourth to one-third of their value, and under circumstances which were such as to justify the jury in coming to the conclusion that the prisoner knew when he purchased these goods, that they had been stolen. The sales to the prisoner were made as often as once or twice a week during the above period.

"Part of the gloves and some of the handkerchiefs were identified as having been sold to the prisoner in the latter part of December, 1880, and a few of the other handkerchiefs, of the value of \$25 or \$30, were identified as having been sold to him in the month of March, 1882.

"The evidence as to the sale of the remaining handkerchiefs was general, and did not specify any particular occasion on which any portion of them were sold.

"After the evidence for the Crown had been closed, the defence applied to the Court to order the prosecution to elect on which of the offences it was intended to proceed against the accused, and that such offences should not exceed three in the space of six months.

"I ruled that the Crown was not bound to elect, and that the prisoner was bound to pro-

ceed on the whole case. Whereupon the prisoner adduced some evidence, and the jury returned a verdict of guilty of the charge laid in the indictment.

"I reserved the following questions, which I beg to submit to the Court of Queen's Bench sitting in error and appeal :—

"1st. Was the Crown bound to elect on which of the receivings it intended to proceed against the prisoner ?

"2nd. In case my ruling be considered incorrect, can the verdict be sustained ?

"No sentence was pronounced against the prisoner, who has been remanded and waits in gaol the decision of the Court on the above questions.

"Montreal, 30th June, 1882."

The conviction was sustained, the Court being of opinion that Sec. 6 of the Larceny Act, 32-33 Vic., Cap. 21, did not apply to the case of receiving. The following order was made :—

"It is considered and adjudged and finally determined by the Court now here, pursuant to the Statute in that behalf, that an entry be made in the record to the effect that, in the opinion of this Court, the proceedings had and taken in the said Court at Montreal are regular ; that the ruling of the Judge presiding the said Court of Queen's Bench is correct, and that no reason hath been assigned by and on behalf of the said Jean Suprani sufficient to set aside the conviction on the indictment in this cause.

"It is therefore ordered that the said conviction be, and the same is hereby affirmed ; and that it do stand in full force and value."

Conviction affirmed.

A. Ouimet, Q.C., for the Crown.

St. Pierre, for the prisoner.

SUPERIOR COURT.

MONTREAL, April 21, 1883.

Before TASCHEREAU, J.

BIGONESSE V. BRUNELLE.

Rape—Evidence.

In an action of damages by the father of a minor, for rape, where the case rests upon the unsupported testimony of the girl, and there is counter evidence to the effect that the girl is not

of irreproachable character, the action will not be maintained.

PER CURIAM. The plaintiff brought the present action as the father of Josephine Bigonesse, a minor, whom he alleged to have been violated by the defendant on the 3rd December, 1881. The outrage, it was said, was committed late in the evening while the girl was crossing a field about three acres from her residence and in front of a barn belonging to the defendant. The action was not brought until May or June 1882, when the girl was in an advanced stage of pregnancy, and on the 5th of September of the same year a child was born.

The defendant denied the charge entirely.

At the trial the girl herself was the only witness brought up to prove the alleged rape, and there was not a single circumstance established to corroborate her statement. The case rests wholly upon her unsupported statement, that the defendant, on the occasion in question, seized her and forcibly had connection with her. She made no complaint or disclosure of the circumstances until long afterwards. It has also been pretended that there is a likeness between the defendant and the child. This point cannot be considered very important when it is remembered that the child was but two or three months old at the time the evidence was adduced.

The Court is not disposed to receive the uncorroborated statement of the girl as evidence of such a grave offence. Moreover, evidence has been adduced on the part of the defendant, showing that the girl's character is not what it ought to be. Two witnesses testified that, to their personal knowledge, she was not virtuous. It would have been easy to rebut this evidence by bringing up those who were well acquainted with her, but in answer to this damaging testimony nothing has been attempted except to call the girl herself, and let her deny the facts alleged against her.

Under all the circumstances it is impossible to condemn the defendant as prayed, and the action is therefore dismissed with costs.

The judgment of the Court is in the following terms :—

"La Cour etc....

"Considérant que le témoignage non corroboré de la soi-disante victime d'un prétendu viol ne peut en règle générale suffire, soit au

civil, soit au criminel, à la constatation légale du crime imputé, surtout lorsqu'il y a de fortes présomptions contre le caractère, l'honnêteté et la chasteté de l'accusatrice;

"Considérant que l'imputation portée par Georgiana Bigonnesse, fille du demandeur, contre le défendeur en cette cause, accusant ce dernier de l'avoir violée et connue charnellement le ou vers le 3 décembre 1881, ne repose sur aucun autre témoignage que celui de la dite Georgiana Bigonnesse elle-même, et n'est rendue vraisemblable par aucune preuve de circonstance et par aucune présomption légale et raisonnable dans la cause;

"Considérant qu'il est établi par plusieurs témoins que la dite Georgiana Bigonnesse a fait preuve, en diverses circonstances, de mal-honnêteté, de légèreté coupable et même d'immoralité dans sa conduite, ce qui rend suspect son témoignage rendu en cette cause, et laisse au moins place à un doute raisonnable dont le défendeur, comme partie accusée, doit avoir tout le bénéfice;

"Considérant que, pour ces motifs, l'action en dommages-intérêts, portée par le demandeur père de la dite Georgiana Bigonnesse, contre le défendeur, ne peut être accueillie;

"Maintient la défense et renvoie l'action avec dépens distracts," etc.

Action dismissed.

Lacoste, Globensky, Bisailon & Brosseau, for plaintiff.

Geoffrion, Rinfret & Dorion, for defendant.

COURT OF REVIEW.

MONTREAL, JANUARY 23, 1883.

Before SICOTTE, TORRANCE, RAINVILLE, JJ.

MORSEAU, Atty-Gen. v. *BATE*, *es qual.*

Procedure—Action to set aside Letters Patent.

The proceeding was in the nature of a *scire facias*, to set aside letters patent of invention which had been issued under the Act of the Parliament of Canada, 35 Victoria, chap. 26. The proceeding had been taken in the name of the Attorney-General of the Province of Quebec, and objection was made that the action could only be legally brought in the name of the Attorney-General of Canada.

In the Superior Court, Taschereau, J., who rendered the judgment, was of opinion that the objection was well founded, and the action was

therefore dismissed. This judgment was confirmed by the Court of Review, "Considérant que la législation sur les brevets d'invention est exclusivement dans les attributions et pouvoirs du Parlement et du Gouvernement Fédéral, et que par l'acte de 1868 déjà cité tout ce qui peut avoir rapport à l'exposition d'un statut fédéral, et du statut relatif aux brevets d'invention est du ressort et des attributions du département de la justice du Gouvernement Fédéral, il suit que le bref de *scire facias*, dont parle la section 29 du Statut de 1872, doit émaner sur le *fiat* du Procureur Général du Canada et non du Procureur-Général de la Province de Québec, etc."

Judgment confirmed.

Archibald & McCormick, for plaintiff.

Church, Chapleau, Hall & Atwater, for defendant.

RECENT DECISIONS IN ONTARIO.

Railway—Crossing on railway premises—C. S. C. cap. 66, secs. 104, 145.—A railway crossing on the company's premises for the convenience of passengers and others in going to and from the station on railway business, is not a public crossing, highway, or place, within C. S. C. cap. 66, sec. 104, so as to require the statutory signals to be given by trains approaching it; but nevertheless due care must be taken to prevent damage being sustained by reason of such crossing. Section 145 applies to the Railway company's grounds in cities, towns and villages, as well as to the limits outside such grounds.—*Bennett v. The Grand Trunk Railway Co.*, Common Pleas, Ontario, June, 1883.

Criminal Law—Indictment—Omission of word "feloniously."—An indictment, purporting to be under 32-33 Vict. cap. 22, sec. 45, which charged the defendant with "unlawfully and maliciously," instead of "feloniously," maiming and wounding two horses, &c., is bad.—*Reg. v. Gough*, Common Pleas, Ontario, June, 1883.

Railway—Consignment of grain—Right of railway company to warehouse with other grain.—The plaintiff consigned and shipped by the defendants' railway to D. at their Brook street station, grain which had been sold by sample, signing a consignment note and taking a shipping receipt. The grain was carried to Toronto and warehoused by the defendants in their elevator, under, as they contended, a right conferred on

them by the conditions of the shipping contract. They then tendered to the consignee grain of the same grade as that received by them from the plaintiff, which the consignee refused to accept. The shipping contract showed that a distinction was made between grain consigned to and that not consigned to the defendants' elevator. *Held*, that the defendants under their conditions had only the right to warehouse in their elevator grain shipped thereto, and not grain shipped to another specific address, and that the plaintiff was entitled to recover the damages sustained by the non-delivery of the specific grain shipped by him.—*Leader v. Northern Railway Co.*, Common Pleas, Ontario, June, 1883.

Discharging water from building upon street—Formation of ice thereon—Negligence—Liability of proprietor.—The defendants were the owners of a building erected on the limit of the street. A pipe connected with the eave-troughs, conducted the water which collected on the roof down the side of the building, and, by means of a spout projecting over the sidewalk, discharged it upon the sidewalk; and in the winter this water was formed into a ridge of ice, upon which the female plaintiff slipped and fell while walking on the street, and injured herself. The jury found that the defendants did not know of the accumulation of ice, and that they ought not reasonably to have known of it. *Held*, that the defendants were not liable. Hagarty, C. J., said the carrying of the water to the sidewalk was a harmless act; the action of the weather was the proximate cause of the accident, and the defendants, not having knowingly allowed ice to accumulate, are not responsible. Armour, J. who dissented, remarked that the conducting of the water to the sidewalk was a wrongful act, and the formation of ice on the sidewalk in winter was the natural, certain, and well-known result of the defendants' act, and they should be held responsible for the accident.—*Skellton v. Thompson*, Queen's Bench, Ontario, June, 1883.

GENERAL NOTES.

The bar of Ontario have made active preparations for the entertainment of the Lord Chief Justice of England. The dinner is to take place at Toronto, September 12th.

The last appointments of Queen's Counsel have

caused some consternation in Ontario. The *Canadian Law Times* appends to the list the note "Acts, ii. 12." As the reference is to a work not usually found in lawyers' libraries, we supply the text: "And they were all amazed, and were in doubt, saying one to another, What meaneth this?"

An English solicitor not long ago committed the indiscretion of bringing an action against his own client on a bill given for a loan of money which he had procured for her, through the contrivance of paying the bill himself and then endorsing it to one of his clerks and using the name of another solicitor, an intimate friend of his, in bringing suit on the bill in the name of his clerk; he himself appearing for her as her solicitor, assenting to judgment, and then collecting his costs of her. He was tried in a criminal court and convicted of obtaining money under false pretences, and sentenced to six months' imprisonment. He was also stricken from the roll. He subsequently applied, in the Queen's Bench Division, before Grove and Mathew, JJ., to be reinstated, on a showing that he had since his liberation, supported himself honestly and shown himself trustworthy. The application was supported by the Attorney-General and opposed by counsel on behalf of the Incorporated Law Society. The learned judges refused to reinstate him. The *American Law Review*, St. Louis, remarks on this: "In Missouri the Incorporated Law Society would not have been allowed the privilege of being heard by counsel; the applicant would have been reinstated upon an *ex parte* fixed-up petition, signed by bankers, merchants, lawyers, politicians, and newspaper publishers. The petitioners would then have given him a banquet, or rather he would have given a banquet to them, and the judges would have gone a-fishing with him."

Mr. Justice Alieyn, resident Judge of the Superior Court in Rimouski, died rather suddenly on the 16th instant. The following notice of the deceased is from *Le Quotidien*:—"M. le juge Alieyn avait fait son cours d'études au séminaire de Québec, où il se distingua par sa conduite comme par ses talents. Après avoir étudié le droit à l'université Laval, il fut admis au barreau en 1859 et nommé conseiller de la Reine quelques années plus tard. Il avait agi pendant plusieurs années comme avocat de la Couronne à la cour du Banc de la Reine, et fut nommé en 1875 à la charge de professeur de droit criminel à l'université Laval. L'année suivante, il se présenta contre M. Murphy dans Québec-ouest et fut élu député à la Chambre d'assemblée par quarante-deux voix de majorité. En 1881, la charge de juge de la cour supérieure pour le district de Rimouski étant devenue vacante par la mort de l'honorable juge Maguire, le parlement fédéral choisit M. Alieyn pour le remplacer. C'est alors qu'il abandonna le commandement du huitième bataillon de Québec. Le défunt avait aussi représenté le quartier Champlain au conseil de ville, et occupé plusieurs charges dans différentes sociétés. Le juge Alieyn était universellement estimé et sa mort sera longtemps regrettée. Il était âgé de quarante-huit ans seulement; c'était le fils de l'ancien capitaine Alieyn et le frère du shérif de Québec. En premières noces, M. Alieyn avait épousé mademoiselle Lindsay, et en deuxième noces, mademoiselle Déléry, qui lui survit."

The Legal News.

VOL. VI. SEPTEMBER 1, 1883. No. 35.

HOW JUDGMENTS ARE PREPARED.

The *American Law Review* supplies some notes about the manner in which judges do their work in the chambers of the Supreme Courts of the several States. We give a *resumé* below:—

"If our readers have any curiosity to know the manner in which the judges of appellate courts consult and assign causes for the writing of the opinions of the Court, we can gratify it to a limited extent. The information which we give below is authentic. It is not as recent as it might be; but it will be found an accurate statement of the facts it purports to give, unless changes have been introduced in particular Courts within a recent period. It is not likely that many such changes have been made, and we shall, therefore, make the following statements in the present tense.

"In the Supreme Court of the United States all cases are decided in consultation before they are given out for an opinion. To this rule there are no exceptions. No opinion is delivered or filed until read in consultation and approved by the judges who agree to the judgment. This, however, applies only to opinions of the Court. The record in every case is examined by each judge before it is taken up in consultation. It is to be borne in mind that the record is printed, that each judge has a copy, and if this were not done, this practice would not be possible. It is not done in Missouri. On the contrary, the Supreme Court of that State is prohibited by statute from requiring it to be done. Therefore it is not practicable for the judges of that Court to make separate, independent, and simultaneous examinations of the record of each cause, seasonably after the argument and submission. In the Supreme Court of the United States a case is never, under any circumstances, referred to a judge to examine and report previous to its decision. Each judge must examine the case for himself and vote in judgment, upon his own responsibility. If, when a case comes up in consultation, any judge asks further time to

examine it, it is laid over as a matter of course; if not, it is discussed and decided. After that, it is given out for the opinion. Ordinarily, the cases are assigned by the presiding judge for the preparation of the opinion of the Court; but this does not prevent other judges from expressing their individual opinions, and delivering them in writing. There is no rule of rotation observed in assigning causes, and no judge has a right to make his selection. There is no rule of practice determining the number of opinions to be written by the several judges. The chief justice, or the presiding judge for the time being, has no powers different from those of other judges, except such as pertain to the ordinary duties of a presiding officer. He has no special control over the order of business; neither does he, more than any other judge, direct or control the record entries. He is charged with the duty of auditing accounts, and, in mere matters of form, sometimes acts without consulting the other judges. Except in mere routine matters, however, the sense of the judges is usually taken before action on his part. He usually takes charge of matters of practice. Some motions may be orally argued; others must be submitted in print. All this is regulated by rule. One hour on a side is allowed for the oral argument of motions, and two for the argument of causes. Additional time may be had if application is made before the argument commences.

"In the Supreme Court of Pennsylvania, the final disposition of a cause is always determined upon before it is assigned to one of the judges to write the opinion. After the argument is heard, each judge examines the case thoroughly. It is then passed upon in consultation, and agreed to be affirmed or reversed. The chief justice assigns it to one of the judges for an opinion. The opinion is read in consultation, discussed, if any one chooses, and then accepted or rejected, and sometimes revised. There is no rule regulating the assigning of causes to the judges to write the opinions of the Court. According to established custom, the chief justice assigns, keeping in view the nature of the case and branch of learning to which it belongs, and the experience and knowledge of the justice to whom he assigns. He endeavors to preserve an equality of labor as far as possible. His right to select and as-

sign is not questioned; but, of course, it is exercised with as much fairness as the chief justice is capable of. No justice selects for himself, and seldom indicates a preference, though sometimes it is done, for obvious reasons. The chief justice, in and out of Court, is the organ of the Court, to whom the preparation of *per curiam* opinions, correspondence, etc., is committed. He conducts the proceedings in Court. He appoints the times of consultation, and attends to matters of course. In general he directs the record entries; but, in all matters of importance in relation to the business of the Court, he acts with the advice and concurrence of his associates. • • • •

"In the Supreme Court of Ohio, in like manner, the final disposition of causes is always determined upon in consultation before the record is assigned to a judge to write the opinion. The record is not examined by each judge separately, as in the Supreme Court of the United States, but by all the judges together, one reading and the others listening. When five cases (for report) are disposed of, the chief justice assigns one to each judge, sometimes consulting the judges as to their preferences. Each judge is assigned an equal number of cases. When there is a division of opinion, the oldest in commission of the majority assigns the case to one of the majority. The chief justice's right to assign cases is recognized where the decision is assented to by him. The chief justice calls the docket, announces the decisions not for report, and all rulings at hearings; determines the order of business, with the advice and consent of his associates, etc. • • • •

"In the Supreme Court of New Jersey the disposition of a cause by affirmance, reversal or otherwise, is usually determined upon in consultation before assignment to the judge who is to write the opinion. It is the duty of each judge to make a thorough examination of the record for himself. After consultation, the presiding judge requests a particular judge to prepare the opinion. This is the usual course, but there is no rule upon the subject. • • •

"In the Supreme Judicial Court of Massachusetts the final disposition of causes is likewise determined upon in consultation before the assignments to the judges who are to write the opinions. The record in each case is thor-

oughly examined by all the judges together, with rare exceptions, not amounting to half a dozen cases in a year; and in those cases, by one or more of the judges severally, and afterwards discussed by all the judges together. The chief justice assigns the cases in equal numbers, as far as may be, to his associates, and a larger number to himself. No rule of rotation is observed while the Court is in session. The presiding judge usually speaks for the Court, and directs the order of business, advising with his associates, when necessary, and subject, of course, to be overruled by a majority of the judges present. • • • •

• • The Court consists of a chief justice and six associate justices. A full Court for the determination of questions of law is required by statute to consist of at least four judges, and is usually held by the chief justice and four associate justices. No question of law is finally determined without the concurrence of four judges, and a re-argument in the presence of those who have not already heard the case is ordered when necessary to secure this end.

"In the Supreme Court of Errors of Connecticut the final disposition of causes is likewise determined by the justices in consultation, before they are assigned for the purpose of writing the opinions. The record in each case is examined by the judges separately. It is printed, and each judge has a copy. The presiding judge has authority to assign the cases to his associates for the writing of opinions; but, in practice, cases are assigned in order, commencing with the youngest judge in cases where all of the judges are of the same opinion. If the rule brings the case to a dissenting judge, the next judge in the majority takes it. This is the general rule, but sometimes it is departed from, if a judge objects to give an opinion in a particular case. • • • •

"In the Supreme Court of Alabama the consultation usually takes place after the assignment of the cause, and after the judge to whom the cause is assigned has prepared an opinion. The record is generally examined only by the judge to whom it is assigned. He reports to his associates the facts contained therein, so far as material to the questions to be decided. If this statement is not satisfactory, or if there is a difference of opinion, each judge, for himself, examines the record. • • • •

"In the Supreme Court of Florida the final disposition of causes is made in consultation by all the judges before they are assigned to particular judges for the writing of the opinion, except in cases free from doubt, or those involving new questions. In such cases, a designated judge examines and writes out his conclusions, after which each judge examines for himself before assenting. Every record is severally examined by each judge, so far as necessary to understand the questions presented in the assignment of errors. The judge who is designated to deliver the opinion first examines and makes a statement of the case, which is commonly accepted by the others, in ordinary or not difficult cases. The presiding judge usually assigns the cases to the judges for the writing of opinions, after conference, and upon first impressions; though this is a matter of usage only. . . .

"In the Supreme Court of Louisiana the disposition of causes is made after consultation, and after the judge to whom the case has been assigned has reported the facts of the case and the points of law at issue. If a majority of the judges concur with him, he writes the opinion; if not, the case is assigned by the chief justice to another justice. Usually, the report is examined by only one of the judges, who reports the facts of the case to his associates in consultation. The presiding judge assigns the cause to the judges for examination and report."

THE HOUSE OF LORDS

The *Boston Advertiser* directs attention to an incident of the Bradlaugh case before the House of Lords, which we have not seen referred to elsewhere, namely, the fact that a lay peer, Lord Denman, voted with one law lord to affirm the judgment. The *Advertiser* says:—"To act as the Supreme Court of appeal in almost all matters is as proper a function of the House of Lords as the trial of impeachments is in the United States Senate, and for the origin of the former power it is necessary to go back to the days when lawyers were scarce, and when many judges had little or no training in the law, when judicial functions were not separated from legislative, and when the general court was not an inappropriate name by which to call the Legislature. In those times every

peer entitled to sit in the House of Lords, whether spiritual or temporal, of whatever age, character, or profession, was entitled to vote upon all questions or law, and exercised his right if his own interest or party spirit called him. Gradually, however, if the matter involved was one of pure law and had no connection with politics, and if public interest was not excited, the custom arose that no lord should vote except those who were peculiarly qualified, as, for instance, peers who were or had been judges. The custom grew in the eighteenth century, although in a half dozen cases or more the lay lords interfered, in matters of election, of ecclesiastical law, the questions involving the descent of a peerage, and in some other cases. Finally, in 1806, in a case involving the right to the guardianship of a child, to use the words of a nobleman then living: 'The House of Lords made a very discreditable appearance, attending in great numbers at the solicitation or command of the Prince of Wales.' From this time forward the scandal ceased, until in 1844 Daniel O'Connell having been convicted of conspiracy, appealed to the House of Lords from the Court of Queen's Bench in Ireland. The government of Sir Robert Peel was anxious for his conviction, and the tory majority in the House of Lords was large, but five or six of the lay lords were whigs, and, although one was absent and one wished to affirm the judgment appealed from, there was still a majority in favor of O'Connell. Accordingly, when the Lord Chancellor, as Speaker of the House, asked those peers who were in favor of reversing the judgment to say "content," three whig law lords answered, but when he asked those peers who opposed to say "not content," several lay lords responded. The Chancellor did not declare the vote, but in a moment put the question again, with the same result. Then Lord Wharncliffe, the president of the council, speaking on the advice of the Duke of Wellington, urged the lay lords to withhold their votes in order that the character of the House of Lords as a court of appeal might be maintained. After a short discussion, in which it was admitted on all hands that there was nothing but their own sense of fitness of things to restrain lay lords from voting, they followed Lord Wharncliffe's suggestion and withdrew.

"In 1876, by the Judicature Act, for the

first time a distinction was established between law lords and lay lords, and it was provided that at each appeal three lords of appeal should be present, and the qualifications of a lord of appeal were fixed by declaring that he must hold, or have held, high judicial office. Before this time, if there were not three law lords present, the number was made up by lay lords, who paid no attention to what was going on, but simply were counted to make up the necessary quorum, which in the House of Lords, was three members. From 1844 until the judgment in the Bradlaugh case above referred to, no lay lord had attempted to vote, and it was thought that by implication the matter was settled in the judicature act. However, when the Bradlaugh case came from the court of appeal to the house of lords, Lord Denman voted with one law lord to affirm the judgment, while three law lords voted for reversal. It is a curious coincidence that Lord Denman, who was bred a lawyer, and is brother to a judge, is the son of one of the three law lords who voted to reverse the judgment in O'Connell's case, and of one who, at the time, strongly deprecated the intrusion of the lay lords."

NOTES OF CASES.

SUPERIOR COURT.

(In Chambers.)

MONTREAL, August 24, 1883.

Before TORRANCE, J.

LAVOIE v. GABOURY, and LEBLANC, *mis en cause*.
Controverted Elections Act, P.Q.—Procedure—Deposit.

Under the Quebec Controverted Elections Act, the filing of an answer on the sixth day after service of the petition is within the delays.

A person put into the cause for alleged corrupt practices is not entitled to exact a deposit.

This was the merits of preliminary objections made by Leblanc to the answer filed by Gaboury to the petition of Lavoie, who contested the election of Gaboury as member for Laval in the Legislative Assembly of Quebec. Leblanc had been put into the cause by Gaboury for alleged corrupt practices. The first of the objections was that the answer had not been filed within the delays—namely, five days after

the service of the petition—38 Victoria, cap. 2, sec. 42. Secondly, that Gaboury had not accompanied his petition by the usual deposit of \$1,000 to answer the costs of Leblanc. Thirdly, that the election petition of Gaboury had not only reference to the election of June, 1883, but also to the election of October, 1882, and that these elections were not one and the same as alleged by Gaboury. Fourthly, that the election of October having been annulled by the judgment of the Court of Review on the 25th May, 1883, it was *res judicata*. Fifthly, that Gaboury did not allege in his answer that Leblanc was a candidate or elector. Lastly, that Gaboury did not allege that he was elector or candidate at said elections.

PER CURIAM. The Court agrees with the judgment rendered by Mr. Justice Loranger on the 7th August, that the filing of the answer on the sixth day after service of petition of Lavoie, namely, on the 27th of July, was sufficient; also, that the defendant, by section 55, would be allowed to allege fraud and corruption without the obligation of furnishing the security or deposit in question. As to the elections of October and June, they need not be separated as to the alleged corrupt practices of Leblanc, and there is no *res judicata* by the judgment of May last. As to the allegation that Leblanc was a candidate and elector, it sufficiently appeared by the petition and answer that he was a candidate, and so also that Gaboury was elector and candidate. Section 55 has been complied with. The preliminary objections are overruled.

Boisvert and A. Lacoste, Q.C., for Leblanc.
Charbonneau, for Gaboury.

CIRCUIT COURT.

L'ASSOMPTION, June 19, 1883.

Before MATHIEU, J.

WILHELMY v. BRISEBOIS.

Church constable a person fulfilling a public function—Tutelle.

A constable duly appointed to maintain order in a church during divine service is a person fulfilling a public duty, and entitled to notice of suit for damages under C. C. P. 22.

The parent has no right to sue for damages suffered by a minor child, unless duly appointed tutor to such child.

The plaintiff, mother of Ferrier Mathieu, a minor, brought an action for \$200 damages, against the defendant, a constable duly appointed to maintain order during public worship in the parish church of Lachenaie.

The complaint was that the constable had maliciously and improperly interfered with the plaintiff's son, by ordering him to kneel during portions of the service, and had put him to shame in the presence of the congregation. The plaintiff sued as natural tutrix for the damages caused to her son.

The defence was first, absence of notice under C. C. P. 22, the defendant being a constable duly appointed to preserve order in the church; and secondly, that the plaintiff had no right of action as natural tutrix.

The Court maintained the defence,

"Considérant que le défendeur remplissait des devoirs publics, et que conformément à l'art. 22 du Code de Procédure Civile, il avait droit à un avis d'un mois, lequel avis ne lui a pas été donné;

"Considérant que la demanderesse ne réclame que des dommages soufferts par son dit fils;

"Considérant qu'elle n'a pas qualité comme tutrice naturelle et qu'elle ne pouvait agir que comme tutrice dûment nommée en justice, ce qu'elle n'a pas fait;

"Considérant de plus que le défendeur a agi dans les limites de ses attributions, et que le dit Mathieu contrevenait à l'ordre, en ne se tenant pas comme il le devait dans la dite église;" etc.

Action dismissed.

C. Lebeuf for plaintiff.

Prévost & Turgeon for defendant.

COURT OF QUEEN'S BENCH.

MONTREAL, JANUARY 20, 1883.

Before DORION, C.J., MONK, RAMSAY & CROSS, JJ.

LA FONDRIER DE JOLIETTE (plff. below) Appellant,

& LA CIE. D'ASSURANCE DE STADACONA CONTRE LE FEU ET SUR LA VIE (def. below), Respondent.

Insurance (Fire)—Waiver of condition requiring notice of other insurance.

By the condition of a policy of fire insurance, the insured was required, on pain of forfeiture, to notify the company of any other insurance effected on the property. The company, after the fire, and after knowledge that other insurance

had been effected, supplied forms for making claim, and joined in an arbitration to settle the amount of damage, and otherwise treated the contract as binding on the company. Held, that this was a waiver of all objection based on the condition requiring notice of other insurance.

The action was based on a policy of fire insurance for \$2,000, and the case was dismissed in the Court below, on the ground that the plaintiff had violated one of the conditions of the policy, which required notice to the company of any other insurance on the property existing at the time, or which might be effected thereafter. The Court held that before the fire occurred the appellant had effected two other insurances on the same buildings, one in the North British and Mercantile Insurance Company, and the other in the Citizens' Insurance and Investment Company, and that the respondent had not received notice of such other insurance, as required by the condition of the policy.

Pagnuelo, Q.C., for appellant, submitted that the judgment contained an error in stating that the insurance in the Citizens' Company was subsequent to the policy sued on. As a matter of fact it was antecedent, and was mentioned in the policy. The condition relied upon by the opposite party simply required notice of other insurance, and notice in writing was not necessary. The company respondent had received notice of the insurance in the North British Company. The Stadacona Company in 1876 and in the beginning of 1877 had suffered considerable losses, the last of which was by the fire in St. John in June, 1877. Immediately after that fire the directors of the Stadacona decided to liquidate, and the secretary on the 28th June, telegraphed to all the agents to the following effect:—"No new business and no renewals to be taken. Notify policy holders to insure elsewhere, and the unearned premium will be returned hereafter," etc. The appellant, on being notified of the contents of this despatch, resolved, on the 3rd of July, to effect another insurance in the North British Company for the same amount. This was done with the knowledge of the Stadacona's agent, Mr. McConville. On the 5th of July, the agent was notified from the head office not to return any cash in acknowledgment of unearned premium. Other telegrams and circulars succeeded this, and finally, on the

20th July, a circular was issued to this effect: "The Company intend to return (after losses are paid) the unearned premium due on the policies surrendered and cancelled only up to the date of July 10, desiring generally to hold existing contracts until expiry, being in a position now to do this." The appellant did not intend to cancel its contract with the insurance company, but only to have an additional security, and the insurance company had never returned any unearned premium, so that the contract had not been cancelled. Their agent had knowledge of the insurance with the North British, and this was sufficient notice. Further, the fire occurred in the morning of the day on which the Stadacona policy expired at noon. The agent at Joliette notified the head office of the loss, and the inspector was sent to the spot and participated in an arbitration to settle the amount of the damage. The company were again informed that the North British and the Citizens had the same risk. It was submitted that the appellant had acted in an open and straightforward manner throughout the business, and that the insurance company had received sufficient notice to meet the condition of the policy. The respondent really profited by the additional insurance, inasmuch as it reduced the appellant's claim from \$2,000 to \$1,400.

Charbonneau, for the respondent, contended that the fact of the additional insurance should have been endorsed on the policy. This was required by the fourth condition of the policy. The pretended knowledge of respondent's agent as to the additional insurance was not a compliance with the terms of the policy, and could not be deemed sufficient notice. If it proved anything, it would be that the policy with the respondent was cancelled, and that would be fatal to the appellant's case. It was further contended that there had been no waiver of the condition.

RAMSAY, J., was of opinion to reverse on both grounds. The company, respondent, by its own act, discharged the appellant from the necessity of giving notice. On the ground of waiver, however, the Court was unanimously to reverse.

The *considérant* on the question of waiver is as follows:—

"Considering that on the occurrence of said fire the respondents were duly notified thereof

by the appellants, and of the existence of the said two other insurances with the said Citizens' Insurance Company and said North British and Mercantile Insurance Company, respectively, and said appellants made and furnished their claim upon respondents in due course, and with due diligence, for which purpose the appellants furnished claim paper, the forms used for their own office, and requested the appellants in making claim to deduct the proportion for which the other two companies would be responsible, and did also by a submission to the arbitration of persons named by themselves and the appellants submit the estimation of the damage caused by fire, and joined in having the same estimated and ascertained, and by such means and otherwise acknowledged the existence and validity of their said policy as a valid and binding contract, and waived any and all objections which they might have otherwise urged, founded on the want of notice of the insurance effected under the other two policies, especially that of North British and Mercantile Insurance Company, and became and were liable to make good to the appellants the proportion of said loss falling to be paid by them in the proportion of an existing insurance by them to the extent of \$2,000, which proportion the appellants consented to reduce to the sum of \$1,400."

Judgment reversed.

Pagnuelo & St. Jean for Appellant.

Trudel, Charbonneau, Trudel & Lamothe for Respondent.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, July 11, 1883.

Before LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR ARTHUR HOBHOUSE.

MACDONALD, Appellant, and WHITFIELD, Respondent.

Promissory Note—Successive Endorsers—Relative Liability.

Where several persons mutually agree to give their endorsements on a bill or note, as co-sureties for the holder who wishes to discount it, they are entitled and liable to equal contribution inter se, irrespective of the order of their endorsements.

The appellant and respondent made their several endorsements upon certain promissory notes, along with other directors of the St. John's

Stone China Ware Company, as co-sureties for the said company to the Merchants Bank, by which the notes were discounted for the Company.

The question in the present case was as to the rights and liabilities of the parties *inter se*. The respondent's pretension was that in determining the rights and liabilities of the endorsers, *inter se*, regard should be had, not to the contract in pursuance of which they became endorsers, but to the order of their endorsements, as evidencing the terms of the contract.

The Judicial Committee held that this doctrine was at variance with the principles of English law (the case being governed by the law of England in force on the 30th May, 1849: C. C. 2340 and 2346). The following portion of their lordships' observations explains the question decided:—"In the present case the appellant, although his endorsement was first written, was a stranger to the notes in the same sense as the respondent, and it is not matter of dispute that the endorsements of both were given for one and the same purpose, viz., in order to induce the Bank to discount two of the notes, and pay the proceeds to the promisor, the St. John's Stone China Ware Company, and also to give the company credit in account current to the amount of the third note. It was argued, however, for the respondent that in the absence of some special contract or agreement between them, *dehors* the notes themselves, strangers giving their endorsements successively must be held to have undertaken the same liabilities *inter se* which are incumbent on successive holders and endorsers of a note for value. The appellant and respondent must, therefore, it was said, be assumed to stand towards each other in the relation of prior and subsequent endorsers for value, inasmuch as it had not been proved, *habili modo*, that they had specially agreed that their endorsements were to have the effect of making them co-sureties for the promisor. On the other hand, it was contended for the appellant that all the Directors who endorsed the notes in question must now be treated as co-sureties, seeing that their endorsements were made, without reference to the order of their signatures, in pursuance of a mutual agreement to give their joint guarantee to the Bank that the notes would be duly retired by the Company.

"Their Lordships see no reason to doubt that

the liabilities, *inter se*, of the successive endorsers of a bill or promissory note must, in the absence of all evidence to the contrary, be determined according to the ordinary principles of the law merchant. He who is proved or admitted to have made a prior endorsement, must, according to these principles, indemnify subsequent endorsers. But it is a well-established rule of law that the whole facts and circumstances attendant upon the making, issue, and transference of a bill or note, may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as endorsers; and that reasonable inferences, derived from these facts and circumstances, are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law-merchant would otherwise assign to them. It is in accordance with that rule that the drawer of a bill is made liable in relief to the acceptor, when the facts and circumstances connected with the making and issue of the bill sustain the inference that it was accepted solely for the accommodation of the drawer. Even where the liability of the party, according to the law-merchant, is not altered or affected by reference to such facts and circumstances, he may still obtain relief by showing that the party from whom he claims indemnity agreed to give it him; but, in that case, he sets up an independent and collateral guarantee, which he can only prove by means of a writing which will satisfy the Statute of Frauds.

"The appellant has not attempted to establish an independent collateral agreement by the respondent, to contribute equally with him and the other endorsers, in the event of the Company's failure to make payment of the notes in question to the Bank. He relies upon the facts proved with respect to the making and issue of these three promissory notes as sufficient in themselves to create the legal inference that all the directors of the company, including the respondent, put their signatures upon the notes, in August, 1875, in pursuance of a mutual agreement to be co-sureties for the company. And, in the opinion of their Lordships, that is the proper legal inference to be derived from the circumstances of the present case." The case of *Reynolds v. Wheeler*, 10 C. B. (N.) 561, was referred to as being in point.

Judgment of Queen's Bench, Montreal (26 L. C. J. 69) reversed.

BILLS OF COSTS.

To the Editor of the Legal News.

SIR,—Among the numerous reforms which are possible in our Quebec law practice it appears strange to me that perhaps the least difficult to effect has been overlooked. I refer to the inconvenience of having the whole bill of costs in a case attributed by the public to the advocate's profits. Would it be too much to suggest a simple order from the Prothonotary that the items of such bills be distributed under the headings "PAID FOR LAW STAMPS," "PAID TO BAILIFF," "PAID TO WITNESSES," "ATTORNEY'S FEES?" The English system is something of this kind, and one or two Montreal offices have their bills made on the same plan. L.

Montreal, August 24, 1883.

THE ENGLISH BANKRUPTCY BILL.

The London *Times* of Aug. 15th gives the following summary of the new law:—

"The measure will come into operation on the 1st of January next; and it is worth while taking notice of the chief changes which it will make. It starts from the principle that bankruptcy should not be made so easy and convenient a process as it is under the Act of 1869. It proposes to treat a man who cannot meet his debts, and who seeks to be discharged from them, very much in the same way in which an officer in the mercantile marine holding a certificate is treated if he lose his ship. There is to be in all cases an examination of the bankrupt, and, what is of still more consequence, the examination is to be of a public character. In many other ways, too, will the path of the debtor be made rougher than it is; but in saying that there is to be a public examination conducted in court, we have indicated one of the chief, if not the chief, of its features. Liquidations by arrangement, as now known, which are about five times as numerous as bankruptcies, will cease to exist; and though creditors may accept a composition or a scheme of arrangement, the approval of the court will be requisite to its validity, and if the terms of the scheme be not reasonable or calculated to benefit the general body of creditors, the court will have full discretion to refuse its approval. Another marked feature of the bill is the creation of a totally new officer, the official

receiver, who is to be appointed by the board of trade, and whose duty it will be to investigate the conduct of the debtor, to report to the court and the board of trade, and to take part, if necessary, in the public examination of a debtor. This official will also act as *interim* receiver of the debtor's estate pending the appointment of a trustee. A leading object of the measure is to put an end to the waste which has so long gone on with respect to bankrupts' estates; and a large part of the bill is directed to prevent frauds by trustees or the accumulation in their hands of sums properly belonging to creditors. If we were to describe briefly the spirit of the measure, we should say that it aimed at subjecting the debtor to a rigorous examination and the trustee to close supervision. The bill contains novel principles; but it is also a return to the much condemned system of officialism. It is, no doubt, a sincere attempt to grapple with great evils; and if, like so many other bankruptcy measures, it fails to satisfy expectation, general despair of doing much good by legislation will be the probable and even the reasonable result.

GENERAL NOTES.

The London *Times* has the following notice of the decision of the Court in the case of Canon Bernard:—"The Correctional Court of Tournai has acquitted Canon Bernard, who was prosecuted for having absconded to America with £200,000 belonging to a fund claimed by two bishops disputing the same see. We have published full reports of this curious trial, and it was evident from the first that the reverend defendant had done nothing to deserve punishment as a criminal. Monseigneur Dumont, Bishop of Tournai, having, in consequence of eccentric conduct, been deprived of his spiritualities by the Pope, chose to consider that this sentence was illegal, and committed his episcopal treasury to Canon Bernard, with orders to carry it beyond the reach of Monseigneur du Rousseaux, the new bishop. The canon bethought him of America as the country where he and the money would be safest, but before starting on his voyage he took care to consult an eminent lawyer, M. de Landtsheere, who was Minister of Justice in the last Catholic Administration. An Englishman who obtained a legal opinion from an ex-Lord Chancellor as to his discretionary powers over trust moneys would probably hold that in following such counsel's advice he was secure from criminal action; but the Belgian government, on behalf of Bishop du Rousseaux, applied for Canon Bernard's extradition, and that unfortunate clergyman had to give up his treasure, and was shut up in prison for thirteen months before being brought to trial."

The Legal News.

VOL. VI. SEPTEMBER 8, 1883. No. 36.

LIBEL.

In his address to the Grand Jury, at the opening of the Queen's Bench term, Montreal, Mr. Justice Baby referred to the subject of libel as follows:—

Parmi les crimes que je vous ai énumérés, il y en a qui exigent de ma part quelques remarques. Vous avez dû être frappé, depuis un certain temps surtout, de la fréquence des délits de la presse. Presqu'à chaque terme de cette cour vous êtes appelés à prendre connaissance d'un ou deux cas de libelle, et dans celui-ci, d'après mes informations, le nombre en sera encore plus grand.

Tout le monde sait parfaitement que le journal est appelé à jouer, et de fait, joue un grand rôle dans l'univers civilisé. Il enseigne au peuple ses obligations et lui fait connaître ses droits; il l'éclaire sur les dangers qu'il peut courir, forme l'opinion, la dirige, réprime les abus, indique les remèdes auxquels il faut avoir recours lorsqu'il y a défaillance quelque part dans l'ordre moral ou politique; le journal exerce, en un mot, une immense influence sur la société.

Chacun doit être heureux de soutenir et faire prospérer dans les mesures de ses moyens les feuilles publiques qui ne s'arrogent pas plus de droits que les individus ne sauraient s'en arroger, d'après la loi. Mais d'un autre côté, si la presse, au lieu de se renfermer dans le cercle de ses attributions, cesse de s'occuper des questions d'ordre public, du redressement des torts publics, de l'instruction du peuple, oublie sa belle mission pour s'attaquer, sous prétexte d'intérêt public, aux simples particuliers, les recherche, fait connaître à la multitude leurs défauts, leurs faiblesses, met à nu et dépeint en couleurs plus ou moins fausses la vie intime des individus et des familles, donne asile et circule ces cancan, ces calomnies dommageables, jetées sur la rue le plus souvent par les lâches et les envieux, et semées ensuite de tous côtés par les langues envenimées des oisifs de toutes sortes, alors ce grand bienfaiteur, je dis, devient une immense nuisance; il est d'autant plus terrible et dange-

reux que ses dires libelleux vont de nos jours partout où l'électricité et la vapeur parviennent.

Mais la rétractation, dit-on, répare le mal, cicatrise la blessure que l'on peut avoir causée. Je voudrais qu'il en fût ainsi. Il est difficile cependant d'adopter cette manière de voir. Vous n'êtes pas de cette opinion, j'en suis bien convaincu, messieurs. La rétractation est souvent pire dans ses effets désastreux que l'article incriminé l'est lui-même. On a hâte d'écrire que les choses ne sont pas telles qu'elles ont été rapportées, que l'on en demande excuse à la personne offensée, mais le tout est si et tellement bien entortillé—car, voyez-vous, on craint de passer pour mal renseigné—que le lecteur de bonne foi qui, en lui-même, avait tout d'abord fait sa part de l'exagération, se dit maintenant qu'il y a bien quelque chose de vrai au fond, car il n'y a pas de feu sans fumée, et ceux qui croient tout ce qu'ils lisent dans un journal, et le nombre en est considérable, et qui ne verront jamais cette rétractation, peut-être, restent sous l'impression que l'individu dont il est question demeure sous le coup qui lui a été porté.

Il est connu qu'il y a une certaine classe de lecteurs qui aime le scandale, qui raffole des situations équivoques, se nourrit d'émotions malsaines, qui se rit, en un mot, des malheurs, des chagrins des autres, de la honte dont une presse éhontée peut couvrir des citoyens respectables.

Est-ce pour cette classe dépravée que la loi doit être mise de côté ou demeurer lettre morte? Non. Il faut que l'honneur, la paix et le bonheur des familles soient protégés, et c'est le devoir, le devoir impérieux de tous les gens respectables de voir à ce que ce mal disparaisse bientôt. Les propriétaires de feuilles bien posées doivent le sentir eux-mêmes, j'en suis convaincu; ils doivent par conséquent exercer la plus grande vigilance sur ce qui est inséré dans leurs colonnes et voir à ce que des plumes inexpérimentées, dirigées souvent par un jugement défectueux, n'aient pas pleine liberté de détruire à volonté le caractère et la réputation de certains individus, sous prétexte qu'il est de l'intérêt public d'en agir de la sorte.

EXTRADITION.

The *Law Times* (London), commenting lately on the probability of a demand being made for the extradition of P. J. Sheridan, observed:—

"The history of the joint arrangements between Great Britain and the United States is not long. In 1794 the two powers agreed, by Jay's Treaty, to deliver up to one another fugitives charged with murder or forgery, provided the evidence of criminality was sufficient. This treaty lasted for twelve years only, and was not renewed. From the period until 1842 there were no treaty provisions as to extradition between the two powers, but it is remarkable that Mr. Clarke in his treatise upon extradition quotes the case of one Daniel Washburne (3 Wharton's Criminal Trials, 473; 4 Johnson Ch. Rep. 106), which shows that in 1819 Chancellor Kent, than whom there is no higher authority upon American law, held that, irrespective of all treaties, it was the duty of all governments to surrender fugitive criminals, or persons charged upon sufficient evidence with criminal offences. In a later trial Chief Justice Tilghman, without going to quite the same length as his predecessor, expressed an opinion that extradition was an international duty which between neighbouring nations was of almost irresistible obligation. In these cases may be seen the *raison d'être* of the famous Ashburton Treaty, signed at Washington upon the 9th Aug., 1842, which still remains, as we find in Mr. Howard Vincent's treatise, the only law upon the subject of extradition between England and the United States. Amongst other crimes which are enumerated in that treaty, as being sufficient to warrant extradition, are murder, assault with intent to commit murder, etc. Mr. Clarke observes that political offences are not specifically excluded, but reminds us that President Tyler, in transmitting the bill to Congress, observed that the bill was carefully confined to such offences as all men agree are heinous, and destructive to the security of life and property, so that political offences and criminal charges arising from wars or intestine commotions might be excluded. The two most important cases which have been decided under this treaty are that of Kaine, in 1852, upon a charge of attempting to commit murder, and that of the famous murderer Muller. . . .

The Ashburton treaty contains no negative clause. The American government does not say that it will not surrender persons charged with crimes not included in the 27th article; it only definitely promises to deliver to the

British authorities persons charged with the specified offences. On the other hand, the words of President Tyler show that the spirit of the treaty does not include political offenders, to which the answer is that conspiracy to murder definite persons for political purposes is not a purely political offence; moreover, it is an offence which is regarded as heinous by the law of all civilized nations. From the history of extradition law in America, it may be concluded that the United States government has a discretion in this matter. The unsatisfactory state of the extradition laws has long been recognised in both countries, and the report of the commissioners appointed in 1878 to investigate the matter contains a proposition that amongst offences sufficient to warrant extradition shall be included all offences against person or property indictable at common law in England. Any treaty in which such a clause is present must of course be reciprocal, and the American government is not likely to fail to reflect that the present law is of considerable antiquity. Finally, if the American government felt a doubt whether it ought, on the hypothesis that it has a discretion, to exercise that discretion according to the desire of the English government, that doubt might be dispelled by these words, quoted in Mr. Lorimer's *Institutes of the Law of Nations* (p. 346): '*Les faits, qui réunissent tous les caractères des crimes de droit commun (assassinats, incendies, vols) ne doivent pas être exceptés de l'extradition, à raison seulement de l'intention politique de leurs auteurs.*'"

NOTES OF CASES.

HIGH COURT OF JUSTICE.

LONDON, NOV. 23, 1882.

LAMB V. MUNSTER.

Privilege on ground of incrimination.

An objection to answer interrogatories, which is made by an affidavit on the ground of the tendency of the answer to criminate the person interrogated, may be valid, although not expressed in any precise form of words, if from the nature of the question and the circumstances, such a tendency seems likely or probable. In an action for libel the defendant pleaded a denial of the publication, and to interrogatories asking him, in effect, whether he published the libel he stated, by his affidavit in answer: "I decline to answer all the interrogatories upon the ground that my answer to them 'might' tend to criminate me."

Held, that his answer was sufficient.

Motion to rescind an order of Watkin Williams, J., in chambers.

The action was for libel, and the defendant by his statement of defence denied the publication of the alleged libel. Interrogatories being administered asking him whether he did not publish the libel, his answer was: "I decline to answer all the interrogatories upon the ground that my answer to them might tend to criminate me." A master ordered a further and better answer; but his order was rescinded by the order of the learned judge.

FIELD, J. I think the learned judge at chambers was right, and that the answer to the interrogatories is sufficient. The point raised is important, for the principle of our law, right or wrong, is that a man shall not be compelled to say anything which criminate himself. Such is the language in which the maxim is expressed. The words "criminate himself" may have several meanings, but my interpretation of them is "may tend to bring him into the peril and possibility of being convicted as a criminal." It is said that a man is not bound to do so. There have been various authorities on the question how the point is to be raised. Suppose a witness in the box declines to answer a question. He is asked why? He answers: "Because it may tend to criminate me." But the judge tells him that he must go further and swear that he believes the answer will tend to criminate him. He answers, "I do not know, but I believe it may do so." The judge tells him that he must go further and say that he is advised that the answer may tend to criminate him. He perhaps replies, "I have no one to advise me in whose advice on the subject I should trust." Then it becomes the duty of the judge to look at the nature and all circumstances of the case and the effect of the question itself, to see whether it is a question the answer to which will really tend to criminate the witness. If he said, "I think it may," or "it may," or "it might," or "I believe it will," or "I am advised it will;" I should not regard the form of words, but look to see whether answering would be likely to have or probably would have such a tendency to criminate, and bearing in mind the cardinal rule that a man shall not be compelled to criminate himself, I should almost prefer a man to be careful and say the answer might tend to criminate, and I should be slow to commit him to prison for not doing that which the law says he is not bound

to do. In this case the tendency to criminate is evident. The statement of claim charges the defendant with the publication of a false and malicious libel, the remedy for which is either by action or indictment. It would be competent to the plaintiff, after having got an answer to the interrogatories, to indict the defendant for libel, and the answer might establish the very first step the prosecutor would have to prove.

I do not think the authorities lay down any principle on which this application for a further answer can be rested. In *Fisher v. Owen*, 8 Ch. Div. 645, the point was only whether the question could be put, and there are many, amongst whom is Brett, L. J., who think it is a mistake to allow a man to refuse to answer on the ground that his answer might tend to criminate him, for this reason, that although a learned judge may regard the answer without being influenced by it, yet on the interrogatories and the refusal of the defendant to answer them being read to a jury, who are asked whether they can doubt that the defendant really did what he was asked about, they would at once find that they did. In *Allhusen v. Labouchere*, 3 Q. B. D. 654, 662, Brett, L. J., doubts whether the equity doctrine is perfectly applicable to the courts of common law. But as the Lord Justice says: "That however is past controversy, and the question has been settled by the Court of Appeal." A decision of Lord Hatherley when Wood, V. C., was cited, and Mr. Woollett produced a case in which there were the same words as those under discussion, but I find in the cases that the learned judges used words such as "will," "may," or "might," indifferently, without laying any stress on the verb. I think there is no substance in the objection to the present answer, and that it is quite sufficient. It is very desirable that the rule should be in favor of the principle of law.

STEPHEN, J. I am of the same opinion. I entirely agree with my learned brother. In every case the principle itself has to be considered, and it would not be well to lay down any kind of strict rule as to the particular form of words in which persons are to be compelled to express their opinion as to whether or not the answer to questions would criminate them. When the subject is fully examined, it will, I think, be found that the privilege extends to protect

a man from answering any question which "would in the opinion of the judge have a tendency to expose the witness, or the wife or husband of the witness, to any criminal charge." Stephen's Dig. of the law of Ev., (3d ed.), art. 120, p. 121. That is what I understand by the phrase "criminating himself." It is not that a man must be guilty of an offence and say substantially, "I am guilty of the offence, but am not going to furnish evidence of it." I do not think the privilege is so narrow as that, for then it would be illusory. The extent of the privilege is, I think, this: the man may say, "if you are going to bring a criminal charge, or if I have reason to think a criminal charge is going to be brought against me, I will hold my tongue. Prove what you can, but I am protected from furnishing evidence against myself out of my own mouth." I do not think the cases cited go any further than this, viz., that the court which has to decide must be satisfied on the oath of the witness that he does object on that ground, and that his objection is *bona fide*. In *Reg. v. Boyes*, 1 B. & S. 311; 30 L. J. (Q. B.), 301, a case not cited in argument, but a somewhat remarkable one, a man called as a witness on an information for bribery refused to answer any question as to his knowledge of the defendant, on the ground that by answering he might criminate himself; a pardon under the great seal was thereupon handed to the witness, who still refusing, was compelled by the judge to answer. This ingenious point was taken, viz., that the pardon was not pleadable to an impeachment by the House of Commons, and that Boyes when he refused to answer after the pardon was handed to him did so under the belief of an impeachment to which the pardon would be no answer. Cockburn, C. J., says: "It was contended that a bare possibility of legal peril was sufficient to entitle a witness to protection; nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law; and that the statement of his belief to that effect, if not manifestly made *mala fide*, should be received at conclusive. With the latter of these propositions we are altogether unable to concur." But he goes on to say that "the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reason-

able ground to apprehend danger to the witness from his being compelled to answer," and also that the danger must be real and appreciable. That is on the whole the principal authority for my view of this case, that a man is not to be forced to answer any question if the witness swears that the answer "may" or "will," or "would" endanger him (I care not for the form of words in which he expresses it), and in the opinion of the judge the answer may, not improbably, be of such a nature as to endanger him. The defendant in the present case is asked whether he has published a libel, and has refused to answer on the ground that it "might" endanger him, and I think that a person who wished to annoy him and cause expense might endanger him, and I cannot say it is an improbable contingency. Having regard to the authority I have cited, it seems to me that a man may say, "I think the answer would tend to criminate me," meaning thereby 'would tend to bring a criminal prosecution against me for a crime of which I am in fact innocent, but of which I might on the facts be very probably accused.'

Order affirmed.

COURT OF QUEEN'S BENCH.

MONTREAL, May 27, 1882.

DORION, C.J., MONK, RAMSAY, CROSS and BABY, JJ.
THE CONSOLIDATED BANK OF CANADA (claimants below), Appellants, and THE MERCHANTS BANK OF CANADA (contestants below), Respondents.

Guarantee—Amalgamated Bank cannot take advantage of bond given to one of the banks consolidated.

Held, that a guarantee given to a Bank which afterwards was amalgamated with another Bank, did not bind the guarantors towards the consolidated Bank.

RAMSAY, J. This case comes up on the contestation of a claim on an insolvent's estate. The City Bank accepted a letter of guarantee from two gentlemen, who thereby bound themselves jointly and severally to and in favour of the said Bank, for the full payment of such notes of two firms which have been, or hereafter may be, discounted by the Bank, thereby making themselves and each of them "as fully liable and bound for the same as if each of them had individually made each and every

of said notes." Later, the City Bank and the Royal Canadian Bank became amalgamated by act of Parliament, under the name of the Consolidated Bank of Canada, and the new Bank, believing itself protected by this letter of guarantee, continued to discount the paper of the firms therein named. The drawers became insolvent, as also the gentlemen who signed the letter, and the claim by the Bank was on the estate of one of the signers. This claim respondent contested by saying the letter of guarantee was to the City Bank and not to the Consolidated Bank, and, therefore, it does not apply. The argument is that *cautionnements* are to be strictly interpreted. But, it is answered, the City Bank has not lost its identity, and at any rate this is not *cautionnement*, but a joint and several obligation.

There is nothing in the wording of the statute to help us over this difficulty. The rights and property of the two banks are transferred to the new. But the rights are evidently only those existing at the time of amalgamation, about which there is no question in this suit. Under the authorities of the English law the case appears to be very clear, that for no equitable consideration can one party take advantage of a guarantee given to another. So where a bond is to one and he forms a partnership with another, the co-partnership cannot take advantage of the security. "Where there is the least difference between the condition and the breach, the surety will not be bound," says de Guy, C. J. "It is not Wright's money that is unaccounted for, but the money of Wright & Company," said Gould, J., in the same case. *Wright & Russell*, 2 Wm. Blk. 934. And where a partner retires the remaining partners cannot take advantage of the bond to the old firm; *Strange & Lee*, 3 East, 484. This rule was adopted in a case in this Court; *Henault & Thomas*, 1 Rev. Leg., 706. Nor can a partnership after it becomes incorporated take advantage of a bond to the old partnership; *Dance & Girdler*, 1 & B. P. new cases, p. 34.

The case of *Metcalf & Brown*, 12 East, 404, cited on the other side, avowedly turns on the interpretation of the terms of the bond, and refers to *Barclay & Lucas* as being defensible on the same ground. In *Pease & Hirst* there was a joint and several note payable to order to give credit to A. at a certain banking house, and it

was held that the note being payable to the five members of the banking-house or order, and being evidently intended to be a continuing security, the makers were liable upon it, notwithstanding a change in the members of the banking-house. All the old cases are to be found in Watson on Partnership, p. 112. My copy is of a very old edition, but the cases are to be found Chap. III. Also Collyer § 613, where it is admitted that *Barclay & Lucas* is no longer law.

But it was contended that the rule of the civil law is somewhat different, and we were referred to Pothier, Obl., 385. But I think that authority supports the principle of *Metcalf & Brown*, namely, that if the security be to representative persons it passes to their successors, and I cannot see that it indicates any substantial difference between the civil law and the English common law. So far as the question under consideration goes, article 1935 C. C. seems to be absolutely conclusive.

But another consideration was pressed upon our notice in reply. It was argued that this was not a bond of surety, but that it was an actual joint and several obligation of Messrs. Mulholland & Baker along with Bartley & Co. and Cleghorn & Co., to be parties as promissors on their notes.

It is difficult to realize this distinction or its effect if once established. Mulholland was certainly not one of the promissors; he was not a party to the note (2344 C.C.) His contract not being a principal one, but an accessory contract, I cannot understand that it can be other than a *cautionnement*. Pothier, Tr. de nantissement, No. 1. He must either be a principal or a *fidejusseur*, Pothier, Obl., 365. But even if there were room for a distinction, or that we could hold Mulholland as party to a note he had not signed, of what use would it be to appellants? It would amount to this, that Mulholland was bound to pay paper discounted by a bank which did not exist, that is, he was bound to do something on a condition which never did or could happen.

In appellant's factum there is an appeal to equity. There is no equitable question to be considered between appellants and respondents I am to confirm.

MONK, J., dissented.

Judgment confirmed.

Ritchie & Ritchie, for Appellants.

R. Roy, Q. C., Counsel.

Lacoste, Globensky & Bisailon, for Respondents.

COURT OF QUEEN'S BENCH.

MONTREAL, January 25, 1883.

DORION, C.J., RAMSAY, TESSIER, CROSS & BABY, JJ.

STEPHEN et al. (defts. and incidental plffs. below), Appellants, and WALKER (plff. and incidental deft. below), Respondent.

Mitoyen wall—Recess made therein.

The parties are owners of contiguous properties on the east side of Notre Dame street, occupied as *restaurants*.

RAMSAY, J. This litigation began by a suit on the part of respondent to compel appellants to close a door which had been opened by them into a common passage leading to the back yards of the properties respectively owned by the parties appellant and respondent. This action was met by an incidental demand on the part of appellants, calling on respondent to fill with *verre dormant* a door opened by him into the passage, to pull down a wall built by him, and to restore a *mitoyen* wall in which he had cut a hole in order to extend his window frontage on Notre Dame Street.

The merits of these various pretensions must be judged by two deeds, one passed in 1800 and another passed in 1832. It has been contended that the second of these deeds completely avoided the former, and makes the rule by which we must be guided. I cannot concur in this view. It seems to me that the two deeds must be read together, and that the former one is only affected by the latter, in so far as they are incompatible. I think, then, that the second deed, by which appellants secured the *mitoyenneté* of the western gable of respondent's house, did not give him any greater rights in the passage than he had before, and therefore, that his opening a door into the passage was an infringement of the rights of the respondent. So far, then, the judgment appears to me to be correct.

Then, as to the question of the glass door opened by respondent, the Court below has condemned respondent to put in *verre dormant*, and there is no appeal from this decision, so we have only to discuss this question in so far as regards the right of respondent to open a door there at all. On this point I am with respondent. I don't think the door on the slant is any violation of the *acte* of 1800. There is

nothing in the *acte* of 1832 which touches the matter.

Then, as to the building a wall in the place of the gate-way contemplated in the *acte* of 1800, I do not think appellants can complain of this. The right to make gate-ways was a mutual stipulation for the convenience of each of the parties to the deed, and therefore the right may be abandoned by either at his pleasure. It did not require any stipulation to permit either party to build a wall in the line of the slant, for it is a common law right.

Last, we come to the hole made by respondent in the wall. That is clearly illegal. Respondent could not do this without a demand to appellants to allow him to do this work, and, on his refusal, taking the precautions required by the Code (519). We are therefore to reverse so much of the judgment as affects the interference with the *mitoyen* wall, and to condemn respondent to restore the wall to its former condition within six months of the service upon him of the judgment in this case. Respondent must pay the costs of this appeal.

The judgment is as follows:—

"The Court, etc.

"Considering that there is no error in so much of the judgment appealed from, to wit, the judgment rendered by the Superior Court sitting at Montreal, on the 30th day of June, 1881, as condemns the appellants on the principal action, doth confirm the same;

"And considering that as regards the incidental demand, it is established that the respondent has made or caused to be made a recess in the thickness of the *mitoyen* wall between his premises and those of the appellants, and this without the consent of appellants, or, in default thereof, and, on the refusal of the appellants so to consent, without causing to be settled by experts the necessary means to prevent the new works from being injurious to the rights of others;

"And considering, therefore, that there is error in the judgment dismissing so much of the incidental demand as refers to the opening of the said recess by respondent, doth amend the said judgment by setting aside so much of the said judgment on the incidental demand as refers to the said recess only, confirming the said judgment as regards the incidental demand for the rest;

"And proceeding to render the judgment the said Court ought to have rendered regarding the said recess, doth order the said respondent, plaintiff and incidental defendant in the Court below, within six months of the service upon him of this judgment, to restore the said *mitoyen* wall to the same condition in which the said wall was prior to the making of the said recess, with costs of this appeal against the said respondent. (Tessier, J., dissenting.)"

Judgment reformed.

Davidson & Cross, for Appellants.

Judah & Branchaud, for Respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, May 27, 1882.

DORION, C.J., RAMSAY, TESSIER, CROSS and BABY, JJ.

QUINS (def. below), Appellant, and LEDUC (plff. below), Respondent.

Dividing wall—Alleged encroachment.

The appeal was from a judgment of the Court of Review at Montreal, condemning the appellant to demolish a gable wall which, it was pretended, rested upon the wall of respondent's house, or to pay \$55.46, half of the estimated value of the wall.

The parties are owners of adjoining properties on Sydenham street, in St. Mary Ward. The pretension of the respondent was that the appellant's house is constructed so as to rest upon a gable wall of respondent's building, and he asked for the demolition of the wall, unless the appellant paid half the value of the gable. The first court dismissed the action, but this judgment was set aside by the Court of Review, and the appellant was condemned as prayed.

The appellant submitted that the evidence showed that he had made no use of the gable of his neighbor, and that the two walls were quite separate.

RAMSAY, J. This is one of those wire-drawn actions which has no claim to favorable consideration. The plaintiff claims from the defendant a sum of money for no real equivalent, or that he shall be subjected to a very serious inconvenience. Technically, the demand is based on the following allegations: 1. That plaintiff's wall is not *mitoyen*, but that it is built entirely on his own land; 2. That defendant used the wall so built on plaintiff's land, and supported his house upon it.

The defendant met this demand by two pleas. In the first he said, my wall is complete in itself, and I did not use your wall, which is not *mitoyen*, and which is a mere wooden structure with a shell of brick. He pleaded also the general issue.

The evidence discloses that the wall is not *mitoyen*, that though built at the foundation on plaintiff's property it hangs over defendant's property, that defendant's wall is complete in itself—that is, self-supporting, that it exceeds plaintiff's wall where it overhangs defendant's land, and that defendant, in order to cover this inequality, and, I presume, to preserve his rights, pushed his bricks above plaintiff's wall so as to cover his own line. In other words, instead of turning on plaintiff and compelling him to rebuild his wall perpendicularly, he good-naturedly suffered the slight inconvenience, probably considering that the whole matter could be set right when these temporary buildings were replaced by others of more importance. For this good-natured act he has been dragged into a suit which has lasted nearly four years, and probably put him to considerable expense and annoyance. Evidence of a lengthy and very expensive kind has been rendered necessary to establish a simple fact which plaintiff must have known just as well the day he brought his action as he does now, and which he wilfully mis-stated in his declaration in order to give himself a semblance of a right of action.

But the most curious part of the argument is that the defendant's pleas are not sufficient, because he does not specially plead that the wall of plaintiff leaned over his land. It is no matter of exception. He denies specially the alleged fact that he used plaintiff's wall, and he denies generally the necessary allegation of plaintiff that "*le dit pignon est exclusivement construit sur le terrain du demandeur*," and the fact alleged in such positive terms by plaintiff turns out to be not only inexact, but calculated to deceive. I cannot see why Laurent thought it necessary to make a second report, for there is no essential difference between his report and that of Bulmer and Esther, except that he tells us that defendant's wall is *accollée* to plaintiff's, and because it has no *mur de fondations*. These facts do not alter the question at all, neither does the fact, as explained,

that defendant's wall *embarque* on plaintiff's *pignon*. This being the opinion of the Court the judgment will be reversed with costs of all the courts against the respondent.

The judgment is in the following terms:—

"La cour, etc.,

"Considérant que l'appelant ne s'est pas servi du mur de pignon de l'intimé pour soutenir son mur;

"Considérant que le mur de pignon de l'intimé n'est pas exclusivement bâti sur son terrain; mais que le dit mur de pignon surplombe le terrain de l'appelant, et qu'il est en preuve que l'exhaussement du mur de l'appelant au-dessus du pignon de l'intimé n'excède pas la division des terrains des parties en cette cause;

"Considérant qu'il y a erreur dans le jugement de la Cour Supérieure siégeant en révision à Montréal le 31^{me} jour de mai 1880, par lequel le dit appelant, défendeur en cour de première instance, est condamné à payer au demandeur, intimé, la somme de \$55.46, moitié de la valeur du dit mur de l'intimé, et les dépens; et que le jugement de la cour de première instance, savoir, le jugement rendu par la Cour Supérieure siégeant à Montréal, le 30^{me} jour de septembre 1879, était bien fondé, renverse, casse, et annule le dit jugement de la Cour de Révision, savoir le dit jugement du 31 mai 1880 et, procédant à rendre le jugement que la dite cour de révision aurait dû rendre, renvoie l'action du dit intimé-demandeur, avec frais tant en cour de première instance et en révision que sur cet appel."

Judgment of C. R. reversed.

Robidoux & Fortin, for Appellant.

Béique & McGoun, for Respondent.

GENERAL NOTES.

Mr. L. W. Coutlee has been appointed Deputy Attorney-General in Manitoba. Mr. Coutlee was admitted to the bar of Manitoba during Easter term, 1882, and has since practised in Winnipeg; he is also a member of the bar of Quebec, admitted midsummer 1873, a member of the bar of Ontario, admitted during Hilary term, 1875, and a graduate of McGill University, Montreal.

Some time ago a number of barbers were summoned before Police Magistrate Denison, charged, under an Act of Charles II., with shaving on Sunday. The magistrate discharged them on the ground that shaving had become an act of cleanliness and therefore of necessity. More recently three barbers of Oldham, England, for the same offence were fined five shillings each.—*Mail*.

A step of some importance was taken during the last session of Parliament towards the redemption of the national debt of Great Britain. A large amount of terminable annuities will become due in 1885, and it is proposed to replace these by others, which will extinguish £173,000,000 in twenty years. This, with the occasional reduction effected by surpluses, will probably reduce the debt in 1905 to £550,000,000. At the close of the Napoleonic wars in 1815 the national debt was only £110,000,000 greater than it is now, but the debt *per capita* was £46, against £22 now, and the annual interest charged was about 32 shillings per head of the population against 14 shillings now. In the Queen's speech at prorogation it was said: "The provision which you have made for further continuous redemption of the national debt will materially aid in the maintenance of public credit."

The *London Standard*, an independent journal, referring to the prolonged debates of the Commons, after admitting that at one time the House of Lords might be described as a mere court of registry, goes on to say: "But affairs are very different now. The relative position of the House of Lords and the House of Commons has been reversed. The House of Lords is now the abler and more statesmanlike of the two. If this be an accident, it is what may be called a durable accident, for it has lasted for some years, and shows no signs of coming to an end. And under these circumstances, any attempt to oust the House of Lords from the discharge of its allotted functions in our constitutional economy ought to meet with the instant reprobation of all impartial men."

The following is the official text of the decision in the Canon Bernard case:—"This tribunal is not competent to adjudicate upon the acts committed in America which are charged against the Canon. As regards his proceedings in Belgium, he acted in good faith and according to orders of his superiors when he carried off the treasury. This good faith is attested by the letter of Canon Bouvry, pointing out to Canon Bernard the danger of suffering the treasury to remain at Tournai, by the silence of the bishop, and by the fact that no proceedings were taken against Canon Bernard. Admitting that he allowed himself to be carried away by his zeal, still no fraudulent intention has been proved."

The election cases in Ontario have yielded a crop of humorous incidents, to compensate for their intrusion upon the summer vacation. In the Muskoka case, before Mr. Justice Ferguson, a witness stated that "he was introduced to the mysterious stranger by Edward Miller." Mr. BETHUNE—"What was the mysterious stranger?" WITNESS—"Why, he was as like him as two peas." (Pointing to Mr. Justice Ferguson.) This, we are told, excited uncontrollable laughter in court, in which the learned judge joined heartily. Counsel thought it necessary to elicit the further answer that "the stranger was not Mr. Justice Ferguson." In the East York case, before Mr. Justice Galt, a witness distinguished with some ingenuity the stages of inebriation. He admitted "that in consequence of having just seen some old friends he was a little the worse for liquor, and all that passed was said by him jokingly and in fun; he was not drunk, but just half and half, perhaps a little on the drunk end."

The Legal News.

VOL. VI. SEPTEMBER 15, 1883. No. 37.

VAGRANCY.

Some English journals are asking that the penalties enacted by the law of vagrancy should be enforced, especially those applicable to incorrigible offenders. At present, it is said, the provisions of the law respecting "incorrigible rogues" are practically inoperative, and are limited to bringing before the court from time to time a few aged offenders, the sturdy beggar rarely making his appearance. The law still provides for the whipping of males previously convicted, but the statute is not enforced. Legislation on this subject has undergone a wonderful alteration in the direction of clemency. Sir James Stephen, in his *History of the Criminal Law*, thus refers to some of the old enactments upon the subject: "Some acts were passed in Henry VII's time which authorized constables and others to put vagrants into the stocks instead of committing them to gaol; but the next act of much importance on this subject was passed in 1530: it was 22 Hen. 8, c. 12, and imposed most severe penalties on vagrants. The impotent poor were to be licensed by the magistrates to beg within certain local limits. Out of those limits begging was to be punishable by two days and nights in the stocks with bread and water. Begging without a letter was to be punished by whipping. Vagrants, 'whole and mighty in body, and able to labor' were to be brought before a justice, high constable, mayor, or sheriff 'who at their discretion shall cause every such idle person to be had to the next market town, or other place most convenient, and to be there tied to the end of a cart naked, and be beaten with whips throughout the same town or other place till his body be bloody by reason of such whipping.' After this he was to be sent back to labor, being liable to more whipping if he did not go straight home. 'Scholars of the universities of Oxford and Cambridge, that go about begging, not being authorized under the seal of their universities,' were to be treated as 'strong beggars.' 'Proctors and pardoners going about without sufficient authority,' people pre-

tending to knowledge in 'palmistry or other crafty science' and some others of the same sort, [including, we suppose, weather prophets] were to be even more severely handled. For the first offence they were to be whipped for two days together, for the second offence 'to be scourged two days, and the third day to be put upon the pillory from 9 till 11 a. m., and to have an ear cut off. For the third offence the same penalty, the other ear being cut off.'

RESTRAINT UPON TRADE.

The bar are ringing the changes upon the objection to the constitutionality of local statutes on the ground of interference with trade. One of the latest cases came up the other day before Chief Justice Wilson, at Toronto, in *re Daniel McKnight*, in which it was seriously contended that by-law No. 1231 of the city of Toronto, regulating the keeping of cows and pigs within certain limits in the city, is illegal, as constituting a restraint upon trade and commerce. It was urged that the by-law should not be directed against the animals objected to, unless they are proved to be nuisances. The notions of people about nuisances differ pretty widely, and magistrates would often have a difficult task to decide, on the accumulation of testimony, whether Patrick's pig was or was not sufficiently cleanly to be recognized as a lawful citizen. We imagine that the restraint upon trade would lie rather in the toleration of such practices as the keeping of pigs under the windows of one's neighbours, because traders with noses would be moved to carry themselves and their financial abilities elsewhere.

INTERNATIONAL COPYRIGHT.

To judge from the length and the variety of the correspondence upon the subject of international copyright which appears every day, or almost as often, in the columns of powerful contemporaries, it would appear to be in a fair way to become one of the burning questions of the day. The nations most interested in the solution of the problem are the great English speaking nations of Englishmen and Americans, and this for obvious reasons. Every scientific or historical work, every popular novel, every poem, and indeed every legal work, is, to a certain extent, calculated to obtain an equal

sale in either country, and it is not strange that authors should complain bitterly of the literary piracy which is now said to have become a custom of the publishing trade. To the honor of English publishers we believe it to be correct to say that, in this respect, they are better than their brethren in the United States, but they are not entirely without reproach. To the credit of both Americans and Englishmen again be it said, that until quite recently the honest etiquette of an honorable trade was sufficient to prevent the necessity of considering means by which literary piracy should be checked. That necessity has arisen now, and the problem presents itself to a practical mind in two different aspects. In the first place, it is proper to inquire what the law upon the subject actually is at the present time; and in the second, it may not be improper to consider any amendments which would be likely to prove acceptable to both nations as a whole, and which are sanctioned by the principles of justice.

The English law upon the subject, which must be our chief concern, is, beyond question, in a very doubtful state; even Mr. Shortt, in his admirable work upon the law relating to works of literature and art, being unable to express a clear opinion as to its positive condition. In showing us this he does not, however, fail to indicate the fact that the difficulty has presented itself to judges upon several occasions, and that they have found it as difficult of solution as any legal writer. With a preliminary confession of obligation to the distinguished author, to whom reference has been made, it may be well to trace the history of some of the cases which have been decided with regard to this vexed question. In *Cocks v. Purday*, 5 C. B. 860, it was held that an alien residing abroad would acquire copyright in any work first published by him in this country as author, or as author's assignee, on the ground that copyright is purely personal property, and the same doctrine was afterward upheld in *Boosey v. Davidson*, 13 Q. B. 257, with regard to a musical composition by a foreigner. But in *Boosey v. Purday*, 4 Exch. 145, the Court of Exchequer refused to follow the above view, and expressed a precisely contrary opinion, Chief Baron Pollock saying (*inter alia*) that the Legislature must be considered *prima facie* to mean to legislate for its own subjects only. Finally, in the case of

Boosey v. Jeffreys, 4 H. of L. Cas. 843, all the judges were called upon to give their views upon a similar point. Four (Barons Alderson and Parke, Chief Baron Pollock, and Chief Justice Jervis) were of one opinion, that a foreigner must be a resident of England at the time of the publication of his work there if he wished to secure the copyright, and Lord Cranworth, Lord Brougham, and Lord St. Leonards agreed with them; on the other hand six judges (Justices Williams, Erie, Wightman, Maule, Coleridge and Crompton) were of the contrary opinion. The Law Lords rested their judgment upon the argument of Chief Baron Pollock, in *Boosey v. Purday*, which has already been quoted. The case was again questioned in *Routledge v. Low*, L. Rep. 3 H. of L. Cas. 100; 18 L. T. Rep. N. S. 874, where it was held that the real condition of obtaining the advantage of copyright was the first publication of a work in the United Kingdom; and the view taken by Lord Cairns and Lord Westbury in this case is supported by the terms of the naturalization act of 1870, sect. 2 of which cannot be construed so as not to include copyright. From the statement of English law which has been made, several inferences are obvious. Any author who chooses to resort to the United Kingdom, or to any part of the British dominions, at the time when he is publishing any work for the first time, acquires copyright of that work within the sphere of the English law, and, upon going through certain formalities of registration, and the like, is entitled to put the law into operation against any persons who infringe upon his rights. The great essential is that the first publication should be in the United Kingdom, and unless this condition be fulfilled an English author is in no better position than a foreigner. It is also obvious that this state of the law is not such as to commend itself to English authors, who would be better pleased if they were enabled to secure the copyright of their works in America and England at the same time. This, at present, it is not possible for them to do, nor will it become so unless, under the provisions of the International Copyright Act, a reciprocal arrangement is made with the United States by which we shall confer on American authors the same privileges as we confer upon our own, and they in their turn, shall protect the property of Eng-

lish authors in America. Such an arrangement might unquestionably be made, but it is more than doubtful whether it would commend itself to Americans or Englishmen in general, and we have some hesitation in asserting that it is a thing which authors are entitled to demand as of right. In any case there is a great deal to be said on both sides.—London *Law Times*.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, September 7, 1883.

Before TACHEMBAU, J.

MACDONALD v. DILLON.

Prescription—Loan—Evidence.

An action for the recovery of a loan not of a commercial nature is not prescribed by five years; and where a bon or note has been given in acknowledgment of such loan, which bon or note is prescribed, the action may be brought on the loan. The note, if prescribed, cannot serve as proof of the claim, which must be established by other evidence.

The action was brought to recover \$100, the amount of a loan made by the plaintiff to the defendant in 1867. The defendant, who gave a *bon* for the amount of the loan, pleaded that the claim was prescribed.

The Court, relying chiefly upon *Whishaw & Gilmore* (6 L.C.J. 319), and the cases cited in the text of the judgment, maintained the action upon the admission of the defendant that the loan was made as alleged.

The *Considérents* are as follows:—

“La Cour, etc.

“Attendu que la présente action est en recouvrement d'une somme de \$100 que le demandeur aurait prêtée au défendeur, à Montréal, le 26 novembre 1867, plus des intérêts accrus sur la dite somme;

“Attendu que le défendeur a par ses défenses nié l'existence du dit prêt, et a prétendu que la seule créance que le demandeur aurait contre lui résulterait d'un certain *bon* consenti à la dite date du 26 novembre 1867, et payable à demande, lequel *bon* serait maintenant prescrit;

“Attendu qu'il résulte des admissions faites

par le dit défendeur lui-même dans son témoignage en cette cause, qu'il a, en effet, le 26 novembre 1867, en la cité de Montréal, emprunté du demandeur (faisant alors commerce sous la raison de de Bellefeuille Macdonald & Co.) la dite somme de \$100, et qu'en reconnaissance du dit prêt il a remis au demandeur le dit *bon* produit en cette cause;

“Considérant que le dit *bon* n'a aucunement nové la dette originaire qui était un prêt d'une nature civile; que cette dette n'est pas prescrite, et qu'étant dûement établie, elle offre au demandeur le recours par lui exercé en la présente cause;

“Considérant qu'il importe peu que le *bon* soit lui-même prescrit, l'action étant fondée sur la dette originaire, et l'existence de cette dette originaire étant amplement prouvée indépendamment de la production du dit *bon* lui-même (*Bagg v. Wurtele*), 6 L. C. Jurist, p. 30, *Gibeau v. Chef dit Vadeboncoeur*, 14 L. C. J. 53; *Darling v. Brown*, 21 L. C. J., pp. 92 et 169);

“Considérant néanmoins que le demandeur n'a pas droit aux intérêts par lui réclamés;

“Rejette la défense et condamne le défendeur à payer au demandeur la somme de cent piastres, avec intérêt à compter du 29 janvier 1883, date de l'assignation, et les dépens distraits au procureur du demandeur.”

D. E. Bowie for plaintiff.

J. L. Morris, counsel.

Duhamel & Rainville for defendant.

SUPERIOR COURT.

MONTREAL, September 7, 1883.

Before TACHEMBAU, J.

LA VILLE DE LONGUEUIL v. LA COMPAGNIE DE NAVIGATION DE LONGUEUIL.

Town of Longueuil—Steamboat wharf—Liability to taxation.

The limits of the municipality of the Town of Longueuil extend to the centre of the river St. Lawrence, and a wharf situated within said limits, occupied and used as the property of a Ferry Company, is liable to taxation by the municipality.

The question decided sufficiently appears by the judgment of the Court, which is as follows:

“La Cour, etc...

“Attendu que la demanderesse réclame de la

défenderesse la somme de \$314, comme suit, savoir : 1o. \$287.50 pour taxes de l'année 1882-3, dues par la défenderesse à la demanderesse sur les biens-fonds imposables appartenant à la défenderesse, et situés en la ville de Longueuil (étant les Nos. 23 et 26 du rôle d'évaluation de la dite ville pour 1882-83); 2o. \$26.50 pour arrérages et intérêts de taxes antérieures ;

"Attendu que la défenderesse a par ses défenses nié ses allégations de la demande, allégué que le rôle d'évaluation et toutes les procédures de la demanderesse relativement à l'imposition des dites taxes étaient invalides, irrégulières et nulles, et prétendu que le dit immeuble No. 26, étant un quai occupé par la défenderesse, était exempt de taxation, vu qu'il était situé dans le fleuve St. Laurent au-dessous de la ligne des hautes eaux, en dehors des limites légales de la ville de Longueuil, et qu'il appartenait au gouvernement du Canada; et de plus que le chemin conduisant au dit quai était une rue publique, aussi exempt de taxation ;

"Considérant qu'il appert par la preuve que la demanderesse s'est conformée en tous points aux exigences de sa charte (44-45 Vic., ch. 75) dans la confection et homologation de son rôle d'évaluation, dans l'imposition des taxes réclamées, et dans l'accomplissement de toutes les formalités requises ;

"Considérant que quant à l'immeuble No. 23 du dit rôle d'évaluation (étant le No. 194 du cadastre et plan officiel de la ville de Longueuil) il est constaté que la compagnie défenderesse est propriétaire du dit immeuble, l'occupe comme telle, et que les taxes réclamées sur icelui sont légitimement dues ;

"Considérant que la rue ou voie publique mentionnée dans la défense n'est pas comprise dans les limites des deux propriétés taxées, et qu'il n'est rien réclamé à raison du terrain occupé par la dite rue ;

"Considérant que les limites de la municipalité de la ville de Longueuil s'étendent jusqu'au centre du fleuve St. Laurent (section 3 de la charte, et article 19, sec. 1, du code municipal) que le quai mentionné dans la défense est situé en dedans des dites limites, qu'il ne forme pas partie du domaine public, mais qu'il appartient à la compagnie défenderesse, qui l'occupe à titre de propriétaire et doit en payer les taxes (sections 129, 229, 125 de la charte, et articles 709, 712 et 714 du Code Municipal);

"Considérant que le pouvoir donné à la demanderesse par la section 242 de sa charte, de procéder contre les contribuables par voie d'exécution parée, en certains cas, n'est pas exclusif de la faculté de poursuivre devant les tribunaux ordinaires en recouvrement des taxes dues ;

"Rejette les défenses, et condamne la défenderesse à payer à la demanderesse la dite somme de \$314, avec intérêt, etc."

Action dismissed.

Lacoste, Globensky, Bisailon & Brosseau for plaintiff.

O'Halloran & Duffy for defendant.

SUPERIOR COURT.

MONTREAL, February 28, 1883.

Before RAINVILLE, J.

ROSS et al., *es qual.* v. ANGUS.

Company—Liquidators—Chose jugée.

1. *The plaintiffs, under the Act 41 Vict. cap. 38 (Canada), possessed the powers of assignees under the Insolvent Act of 1875.*
2. *The company now represented by the plaintiffs, having accepted railway debentures in payment of calls and disposed of the debentures, the plaintiffs could not ask for the rescission of this transaction,—especially without offering back what had been received.*
3. *A judgment confirming the discharge of an insolvent is chose jugée, and the validity of his assignment cannot be questioned afterwards in an ordinary action against him for calls.*

PER CURIAM. The plaintiffs sued in their quality of assignees of the Canada Agricultural Insurance Company. They aver that they have been duly named assignees of the said Company as well by the creditors of the said Company as by an Act of the Parliament of Canada (41 Vic. chap. 38) ; that the assets of the Company have come into their hands for the benefit of the creditors and shareholders of the said company ; that on the 7th September, 1874, and long before that time, the defendant was the President of the said Company, and continued to be so up to the 1st December, 1877, and as such is responsible for the illegal and *ultra vires* acts committed in the administration of said Company and by its employees, by means of which loss was incurred by the creditors and shareholders ; that on the 7th September, 1874, the defendant was owner of 1,000 shares of \$100 each ; that a

call of ten per cent. was then payable on his subscription, and that he, said defendant, has not paid the said ten per cent. call, which amounts to the sum of \$10,000, but has given debentures to the amount of \$11,000 at 80 per cent, \$8,800, his note for \$200 since paid, and \$1,000 for commission; that said transaction was illegal and that the debentures of the Montreal, Portland & Boston Railway Company given were only worth 15 per cent; that on the 26th August, 1876, the defendant transferred 500 shares to Goff and 500 to Dame Anne Lane, wife of Ashley Hibbard; that the transfer to Mrs. Hibbard is illegal inasmuch as the transferee was not authorized by her husband to accept said shares; that the defendant not having paid the call of ten per cent had no right to make a transfer, and that he is still responsible; that said transfer was never recognized by the Company nor by the plaintiffs. A second call was made on the 22nd February, 1877, and a third on the 8th November, 1877, by the Company. A fourth and fifth call were made on the 4th January, 1879, by the plaintiffs; and the plaintiffs pray that the transfer of said shares to Mrs. Hibbard be declared illegal, null, and of no effect, and that the said Dame Anne Lane and her husband be ordered to appear and hear pronounced the nullity of the transfer, and that the said defendant be declared owner of 500 shares in the capital stock of the Canada Agricultural Insurance Company.

The defendant for plea to the action of the plaintiffs alleges: That he is not indebted to the plaintiffs, and that the said plaintiffs have no right of action against him, and that the plaintiffs do not legally represent the Canada Agricultural Insurance Company; that by the Statute 41 Vic., ch. 38 and 21, the company was brought under the jurisdiction of the Insolvent Act, and the plaintiffs were placed in the position of official assignees to whom the Company assigned; but they have not been named assignees by the creditors, and he concludes for the dismissal of plaintiffs' action.

By a second plea the defendant alleges the defect of quality in the plaintiffs, and he next alleges that even supposing that the plaintiffs were qualified they cannot recover, inasmuch as they have not exercised their action within the year after their nomination (C. O.

1040), and he also alleges that the plaintiffs have endeavoured to exercise their claim during the last three years, and have offered to transfer it for \$1,000.

By a third plea the defendant alleges that on December 6th, 1877, he ceded this property under the Insolvent Act, and on the 10th January, 1878, his creditors granted him a discharge, said discharge being confirmed by the Court. Before the said discharge, and said judgment ratifying it, the plaintiffs knew that the defendant was under the operation of the Act, and that about the 10th February, 1879, they filed a claim against the estate of the said defendant, and for the same reasons and for the same object for which the present action is brought, but they afterwards withdrew it.

By a fourth plea the defendant pleaded that he paid the first call of 10 per cent., to wit, \$1,000 granted to him for a commission for his subscription, according to custom, and the balance of \$9,000, part in money, and the remainder by a transfer or cession to the Company of debentures in the Montreal, Portland and Boston Railway, which was accepted by the board of directors. He afterwards transferred 500 shares to Mrs. Hibbard, which transfer was accepted by the authorization of her husband, and that the Company, plaintiffs, afterwards applied to Mrs. Hibbard to obtain payment of the subsequent calls, accepting and acknowledging her as proprietor of the said 500 shares. By a fifth plea they repeat about the same grounds. There is also a general denial.

The plaintiffs answered the first and second questions generally. In their answer to the third plea they admit having withdrawn their claim from the power of the assignees, when they saw themselves threatened by a contestation. By their answer to the fourth plea they admit that the company ratified the payment of \$1,000 for a commission and acquiesced in it.

The first question which presents itself in this cause is the capacity of the plaintiffs. The statute which created them is far from being clear, and the fact that the Court of Appeals has refrained from pronouncing formally on this point, indicates the difficulty of the question. I believe nevertheless, that the intention of Parliament was to formally name the plaintiffs assignees; for if it intended to leave the choice of the assignees to the creditors, of what use

was it to take the trouble to add another one to the original number? If the assignees were to be nominated by the creditors it would have been legal to elect those who might have been chosen, and the duty of Parliament to name another would have been useless and unnecessary. But, without formally deciding the question, I believe that, under the circumstances, the plaintiffs are qualified. It is proved that there was a meeting of creditors, and that no objections were made to the capacity of the plaintiffs; they acted as assignees and the creditors have acted with them, treating them as such, and acquiescing in the position which they assumed and in the interpretation which they gave to the law.—*Error communis facit jus*. Unlike the case decided on the same point by the Court of Appeals, it is proved that the notice calling the first meeting did not indicate that the object of the meeting was to name an assignee; but I do not think this fact can help the defendant. If the quality of the plaintiffs was not regular and legal, the creditors could have complained, but, not having acted, it is too late to do so now; and if the defendant owes to the Company, he would be legally discharged on paying to the plaintiffs.

The second question is to know if the defendant has paid the first call of ten per cent. As to the \$1,000 of commission, I believe that the defendant was in the right; that commission, by the consent of the board of directors, was paid indiscriminately to all those who had right, and the fact that the defendant was president of the Company did not deprive him of that right. As to the payment of \$8,800, it was made by a transfer of \$11,000 of debentures of the M. P. & B. Railway at 80 per cent. It is established that those debentures were accepted by the Company and afterwards transferred to Goff for a valid consideration, and, in fact, Goff gave his note for them, and after certain entries it would appear that this note was nearly paid in full. The plaintiffs pretend that the debentures were only worth 15 per cent. But if so why did the Company dispose of them? Why did the plaintiffs not offer them back? I think the plaintiffs cannot demand the nullity of this payment without giving back what they received.

\\ We now come to the third question: Is the transfer of \$50,000 worth of stock by the defendant to Mrs. Hibbard a nullity? The plaintiffs

submit that the first call not having been paid, the defendant had no right to make this transfer; but this point having been decided against the plaintiffs this pretension falls to the ground. They submit afterwards that Mrs. Hibbard was not authorised by her husband to accept this transfer. On this point I think that the proof establishes beyond a doubt that she was authorised, and the best proof is that she afterwards transferred these same shares to a third party with the authorisation of her husband for advances which were made to her, and these shares are yet in the books of the company in the name of this third party.

The fourth question is as to the discharge obtained by the defendant under the operation of the Insolvent Act. The plaintiffs answer that the defendant has never been a trader, and consequently that the assignment of his estate and the judgment confirming his discharge under the Insolvent Act are invalid. The proof establishes that the defendant did not include the Canada Agricultural Insurance Company in his list of liabilities. But there was good reason for this; he did not acknowledge the company as his creditor. But then the Company received notice from the defendant's assignee of the assignment immediately after it was made. If the Company had wished to contest the defendant's quality as a trader and the validity of his assignment it ought to have done so then. It is without right to do so now. It is only a court adjudging on the direct contestation of this assignment which would have jurisdiction to decide upon its validity. This court is now without right to pronounce upon this point. It is *chose jugée*. Besides, the judgment confirming the discharge of the defendant has freed him from his debts, and is a *fin de non recevoir* against the action of the plaintiffs. The fact that the Company was not mentioned as a creditor in the list furnished by the defendant to his assignee cannot avail the plaintiffs because the Company received notice of his assignment. This was sufficient to permit it to file its claim if it had one, but the defendant could not be obliged to mention the company as a creditor when he did not acknowledge it as such. In fact the plaintiffs did file a claim later on, but in time to be collocated with the other creditors, but on being threatened with a contestation on the part of the insolvent the plaintiffs withdrew it. The

plaintiffs, then, have had every opportunity to obtain their rights, and I am consequently of opinion that the discharge is valid and that the action of plaintiffs ought to be dismissed.

The defendant has submitted besides that the action of the plaintiffs was prescribed, not having been instituted within a year after the nomination of the plaintiffs, and he invokes article 1040 of the Civil Code. The defendant evidently makes an erroneous application of this article of the Code, because it applies to the prescription of an action *revocatoire* brought at the suit of an assignee in order to revoke an act which an insolvent has done with a third party in fraud of creditors. But it does not apply to the present suit. The action is, however, for the above reasons dismissed with costs.

Church, Chapleau, Hall & Atwater for plaintiffs.

Macmaster, Hutchinson, Knapp & Weir for defendant.

THE ECCLESIASTICAL COMMISSION.

The *London Times* (Aug. 16) publishes an abstract of the report of the Royal Commission appointed to enquire into the constitution and working of the Ecclesiastical Courts. For more than two years the commissioners have been busily engaged taking evidence, listening to complaints, enquiring into the past history of the Church Courts in England and into the successive changes which have made them what they have now become, and framing suggestions as to their constitution and powers and methods of procedure. The *Times* observes that the subjects with which the commissioners have dealt are thus of very grave interest to all parties in the Church. Their report comes with the weight of an almost unanimous expression of opinion from a body of ecclesiastics and laymen well qualified to pronounce upon the important questions submitted to them. It remains for the Legislature to give effect to such parts as it may approve, and to establish with the minimum of change a system which it may be hoped will work better and more smoothly than the existing system has been found to do, and may better command the confidence and respect which have been somewhat ostentatiously refused to Church Courts as they are now constituted. The formal recommendations of the report are the part to which chief attention will

be given. They are arranged into three groups, dealing first with procedure in cases of clerical misconduct and neglect of duty; next, with procedure in cases of heresy and breach of ritual; and, lastly, with general and miscellaneous matters. The methods by which clerical offences of any sort are to be brought under cognizance of the law, and the tribunals by which judgment is to be pronounced upon them, are to be much the same in every case. A complaint, whether of misconduct or of heresy, or of breach of ritual, is to be laid before the bishop of the diocese, and it rests with the bishop to put an end to the suit at once or to allow it to proceed. If he determines that it is to proceed, he may, with the consent of the parties, pronounce a final judgment about it. If this consent is not given, the matter will come before the Diocesan Court, in the first instance—that is to say, before the bishop and his legal assessor, with the addition, in cases of alleged heresy or breach of ritual, of a theological assessor. From the decision of this court an appeal lies to the Provincial Court, or official principal of the province. In judging cases of misconduct, this functionary will sit alone. In cases of heresy or breach of ritual, the archbishop of the province may sit with him, or the court may be further strengthened by the presence of theological assessors. In every case the final appeal is to the Crown, and the court of final appeal will be a permanent body of lay judges, of whom five at least are to be summoned in rotation by the Lord Chancellor for each case. The general miscellaneous recommendations are mostly framed with the view of curing proved and admitted defects in the law as it is at present administered. The scandal of a clergyman refusing to obey the sentence of a Church Court is to be provided against, not by his imprisonment, but by the more appropriate method of temporary suspension from his ecclesiastical post. If he disobeys a third time, he may be suspended until he has satisfied the court, and he may be deprived by summary process. In order further to guard against every possible form of clerical perversity, the report suggests that disobedience to a sentence of suspension may be visited, after three months' notice, with deprivation; and that if during suspension or after deprivation a clergyman attempts to perform Divine service in a church forbidden to him, the offence is to be visited as a "disturbance of public worship." The report also recommends that the two archbishops may, if they so choose, continue to appoint the same person as Official Principal of the two provinces. Their choice is to be made subject to certain stated conditions, and the official chosen is to be bound to take the oaths prescribed by canon 127, and to sign the Thirty-nine Articles, or, in other words, to do what Lord Penzance has not done—an omission which has given grave offence to the High

Church party, and has induced them to deny him the right and title of an ecclesiastical judge at all.

The commissioners have suggested a remodelling of the courts in several ways, most notably of the Court of Final Appeal, the functions of which they seek to transfer to an entirely new body. Their reason has probably been not so much that they deem the present courts faulty in construction, as that they have thought it well to make the largest possible concessions to the prejudices and suspicions and complaints of unfair play which have come under their notice. Church Courts should command the confidence of Churchmen. As long as this is refused them there will always be some loophole or other found to escape making submission to them, or some plea of conscience for declining to obey their decisions.

The following are the "reservations" put on record by some of the Commissioners: The Archbishop of York, in signing the report, is compelled to record his dissent from it in two important particulars.

1. In allowing anyone to lodge a complaint, the report makes the hearing of the complaint depend absolutely upon the permission of the bishop. Except with this permission the courts will be closed entirely to a layman, and no layman will have the right of appeal from this absolute decision, however great the wrong which he may conceive himself to have sustained.

2. Great evils have resulted from litigation in the past. To prevent the evils for the future, something should be done to afford a means of direction and arbitration without resort to the courts. One such means is supplied by the Prayer-Book, in the reference to the authority of the bishop when doubts or divers interpretations prevail. But unless the decisions of the bishop are held to be binding, till they are appealed against, they are of no avail. Let the bishop have power to make an order in all matters affecting the conduct of public worship, which shall be binding until reversed by the Court of Appeal. Let the commencement of a suit be either from such an order, or from a trial in the Diocesan Court. Let the appeal lie from the bishop's order to the Archbishop's Court, or from the Diocesan Court to that of the Archbishop. Once make the bishop's authority a reality, and not an utterance of which no court will take notice, and he would be able to compose many of the disputes which now arise about such subjects without prolonged litigation.

W. ESOP.

While agreeing generally with the suggestions of the majority of my colleagues, which, in my opinion, would effect a considerable improvement upon the present mode of procedure in the ecclesiastical courts, I feel unable to concur in the following recommendations:—1. That the bishop should preside in his own

court except under certain specified circumstances:—

(a) I object to this, because I consider that every clerk charged with a breach of the law ought to have the best and fairest trial that the Legislature can provide. With this view, it seem to me that all judges in ecclesiastical courts should be laymen, learned in the law.

(b) Because also, under the recommendations in the report, it seems more than probable that in some dioceses the Court of First Instance will be presided over by the bishop, and in others by the bishop's chancellor, thus creating a very anomalous discrepancy, in the constitution of the court, between one diocese and another.

2. I also object to the continuance of the present mode of procedure, recommended in the report, which requires the consent of the bishop before any proceeding can be instituted in his own court.

3. I concur generally in the suggestion of his Grace the Archbishop of York appended to the report, for giving something of a local character to a bishop's orders as to the conduct of public worship.

CHICHESTER.

1. I am unable to concur in the recommendation that there should be in all cases an appeal from the Provincial Court to the Final Court.

I think that the right to appeal should belong to the defendant only.

2. I dissent also from the recommendation that the obligation on the part of the Final Court of Appeal to obtain from the archbishops and bishops answers to specific questions as to the doctrine or view of the Church of England should only exist when one or more of the lay judges present at the appeal should demand it.

I think that this reference should be made in all cases of doctrine or ritual.

DEVON.

We concur in this reservation.

J. F. OXON,
W. C. LAKE.

We desire to express dissent from that recommendation which gives to the bishop absolute power of refusing leave to institute proceedings in cases of ritual and doctrine.

PARKER DEANE,
THOMAS E. ESPIN, D.D.

I wish to state my dissent from the words which confine the hearing of appeals to the Crown to members of a single profession. I would leave it open to the Crown to appoint lawyers, Churchmen, or any other persons who may be thought competent, as was the case with the Court of Delegates under the statute of Henry VIII. I hold that the examination of questions of this kind constantly calls for knowledge of a special kind, the presence of which is by no means implied in the professional learning of the lawyer, and which is just as likely to be found in other persons, clerical or lay.

EDWARD A. FREEMAN.

The Legal News.

VOL. VI. SEPTEMBER 22, 1883. No. 38.

THE CRIMINAL PROCEDURE BILL.

The history of the measure proposed in England for the codification of the law of Criminal Procedure is related by a correspondent of *The Nation* as follows:—"The bill in the House of Commons for the creation of a Court of Criminal Appeal and that codifying Criminal Procedure were referred to the large standing Committee on Law and Courts of Justice, commonly called the Law Grand Committee. . . . The course of the two law bills has been less prosperous. The Court of Criminal Appeal Bill passed its second reading with little objection, apparently because everybody thought that, after the often repeated demands for something of the kind, it was a matter of course to try the experiment. When its provisions came to be considered in detail the difficulties with which the subject bristles began to be felt. The committee cut the bill about a good deal, but in the opinion of many of our most sensible lawyers the more they changed it the worse it became. The Government declare that they intend to pass it, restoring it in some respects to its original form. But the session has now only eight or nine working days to run; there is a good deal of opposition to the measure and very little zeal for it. Most of the judges are known to disapprove it, and it is quite possible that even if it is forced through the House of Commons, it will perish in the House of Lords. Still more inglorious were the fortunes of the far more ambitious measure which was intended to codify the whole law of Criminal Procedure. It was originally drafted some six years ago by Sir J. F. Stephen, now one of the Justices of the Queen's Bench Division of the High Court of Justice. It was then submitted to two of our most skillful lawyers, Mr. Justice (now Lord) Blackburn and the late Mr. Justice Lush, afterwards a Lord Justice of the Appeal Court. They altered it in many points, and handed it over to Sir John Holker, then Attorney-General, who gave it a further polish, and intended to get it passed in the session of 1879. However, he had to drop it, nor was the present Attorney-General any

more successful in 1881 and 1882. This year it at last advanced to a second reading, and was sent, with good expectations of success, to the Grand Committee. When it came on there Mr. Parnell and several of his Irish allies objected to some of its provisions as unduly severe and despotic, and found some support among a section of the Liberals who sat on the committee. After a while obstruction began, and then it was clear that the bill, which the law officers of the Government did not themselves wholly like, as it was really not their work but that of judges from whose views they differed in important points, could not be carried. It was accordingly abandoned, and is not likely to be taken up until the attitude of Irish Nationalists alters; for at present they can, as indeed any other small but resolute section can, arrest the progress of any measure which has not the full force of the Government to push it through."

LIBEL.

A curious point came before the Queen's Bench Division in *Tompson v. Dashwood* (48 L.T. Rep. [N.S.] 943). The defendant wrote a letter to W. containing defamatory statements of the plaintiff, intending to send it to Col. W., but under such circumstances that it would have been privileged if it had been sent to W. The letter was not sent to him, but by a *bona fide* mistake was inclosed in an envelope addressed to another person who got the letter and communicated the contents of it to the plaintiff. The latter brought an action for libel. The Court held that the letter did not lose its character of a privileged communication. Williams, J., observed: "If a person publish untrue and defamatory statements about another, the law implies malice, and the plaintiff need not prove more than that the statements complained of were untrue and defamatory. But there are occasions when the law negatives the presumption of malice arising from the publication of untrue and defamatory matter; that is, when the party making the statement has a certain interest in the subject-matter of the libel. The question in this case is, whether the defendant stood in such a position with regard to the parties as that privilege would attach to the letter which is the subject of the action. It is admitted that he does stand in this rela-

tion to Col. Wood, so that if the letter had been sent to Col. Wood, as was intended, no action would lie, unless there was proof of actual malice. But it is said that the defendant having carelessly, though unintentionally, sent the letter to the secretary, instead of to Col. Wood, is thereby deprived of the privilege which otherwise would have attached to the letter. It seems to me that this is a fallacy and that all the defendant could be accused of is a want of care in putting the letter in a wrong envelope. There is nothing in this mere accident sufficient to take the case out of the law of privilege and make it actionable, without proof of actual malice. There is no express authority on this point, though cases have been quoted to show that mere accident or inadvertence in publishing defamatory matter, when the occasion is privileged, will not be sufficient to destroy the privilege, nor supply the necessary evidence of malice to sustain the action. I am of opinion therefore that the direction of the learned judge was right, and that this rule should be discharged." Mathew, J., said: "I am of the same opinion. There is no evidence here of a malicious publication, but only of accidental and negligent publication. The writing of the letter was honest, the preparation of it for the post was honest, and sending it to the wrong person was due only to negligence. This act of negligence is not sufficient to deprive the defendant of the privilege, which, it is admitted, he otherwise would have had. It has been argued that the defendant ought to be held responsible for this negligence; but if this were so, and if an action would lie in this case, it would enable a plaintiff to bring an action in a case where it might be that all the defendant had done was to leave a letter carelessly about his room, so that another person could read it. I think the evidence of negligence here is extremely slight, as the person to whom the letter was sent had only to look at the first line of it, to see that it was not intended for him, and that it had been put into the wrong envelope by mistake." The rule was discharged.

MUTUAL ADMIRATION MISPLACED.

The *Solicitor's Journal* (of London) states that a good deal of interest was excited by the development of a new feature in the August

number of the *Law Reports* (Chancery Division). At p. 427, the following passage appears: "[Name of counsel] in reply.—'I regret the absence of Mr. Davey in this important case. Baggallay, L. J.—I do not think that your clients have suffered by its being left in your hands.'"

The *Solicitor's Journal* asks with some indignation, what view the editor and the reporter can take of their respective functions. Reports are intended for the information of the profession as to the state of the law, and everything which does not conduce to that end ought to be suppressed. Commendation of a junior counsel, however well deserved, does not contribute to the enlightenment of the profession, and is utterly misplaced. We have observed a like impropriety. Counsel, in reporting the decision in a case in which they have succeeded, are sometimes inclined to give the judge a pat on the back by referring to the "able and learned decision of the Court," or to the observations "savamment élaborées" of the hon. judge who has sustained their view of the question. These encomiums are quite uncalled for, and only tend to derogate from the dignity of the Court. They are almost as improper as would be the public expression of the maledictory remarks in which the losing suitor is popularly supposed to indulge during the twenty-four hours after defeat.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, August 22, 1883.

Before MATHIEU, J.

GRAHAM et al. v. BENNETT.

Capias—Fraud—Person carrying on business as his own, but his name not appearing in registered firm.

The defendant carried on a business as his own, and, in the opinion of the Court, was the real owner of the stock-in-trade; but in the registered firm his name did not appear as a partner. Held, that fraud being clearly established, and the registered firm being merely a prête-nom for the defendant, who was the real owner of the business, the capias issued against him for sequestration of the assets should be maintained.

A *capias* was issued against the defendant B. F. Bennett, on the ground of secretion. It was alleged that the defendant had been doing business at St. John's, P. Q., under the name of Bennett & Co., and had made promissory notes in the name of the said firm, on which there was a balance due of \$704.67; that he had secreted his effects, etc.

The defendant, in his petition to quash the *capias*, denied the making of the notes, but did not produce any affidavit to state that the signature was forged. He pretended that he was merely acting under a power of attorney from the registered firm of Bennett & Co. Ada E. Hatch, who constituted the registered firm of Bennett & Co., was examined, and stated that she signed the notes, and that the signatures were in her own handwriting.

The Court held that a clear case of fraud had been established. The person registered as the firm of Bennett & Co. was merely a *prête-nom* for the defendant, who was the actual owner of the business. The secretion charged against him was proved, and the *capias* must be maintained.

The conclusion of the judgment was in the following terms:

"Considérant qu'il résulte de la preuve faite en cette cause que le dit défendeur était le seul propriétaire du fonds de commerce de la maison de commerce de St. Jean, tenue sous le nom de Bennett & Compagnie; qu'il a permis qu'on se servit du nom de Bennett dans le but de laisser croire au public qu'il était membre de cette société; qu'il a fait contracter les deux sociétés ci-dessus mentionnées par son prête-nom Ada E. Hatch, et a fait enregistrer les déclarations susdites dans le but de s'approprier le fonds de commerce sans payer ses créanciers, comme il l'a fait; que la dite Ada E. Hatch n'était là que pour rendre service au défendeur et n'agissait que comme son prête-nom; qu'elle s'absentait pendant un assez long espace de temps, de janvier à avril 1882, en laissant le défendeur seul comme administrateur de cette maison de commerce; qu'elle était même absente lors de la cession du 10 janvier 1883, et que l'acceptation de cette cession faite par les créanciers du dit défendeur au nom d'Ada E. Hatch qui la faisait, ne peut être considéré comme une renonciation de leurs droits contre le défendeur leur débiteur;

"Considérant que le dit défendeur est réellement le débiteur personnel des dits demandeurs en cette cause; que les billets qui font la base de la présente action et qui sont mentionnés dans la déposition sur laquelle a émané le bref de *capias* en cette cause, sont dûs par le dit défendeur, vu qu'ils ont été signés pour ses affaires, et avec son autorisation, au nom d'une société qu'il avait formé lui-même dans le but de frauder ses créanciers;

"Considérant qu'en général le tiers n'a d'action contre les co-associés qu'autant que celui qui a traité avec lui s'est donné comme le représentant de la société, et que s'il contracte en son propre et privé nom sans parler de l'association que le tiers ignore, ce tiers ne pourrait agir que contre lui;

"Considérant que le défendeur en cette cause n'a pas représenté qu'il agissait pour une société dont il ne faisait pas partie, mais au contraire a représenté et laissé croire aux demandeurs en cette cause qu'il agissait pour lui-même ou pour une société dont il faisait partie;

"Considérant qu'en supposant même que la dite Ada E. Hatch et le dit Alexander Bennett eussent eu quelque intérêt dans le commerce que faisait le défendeur, il n'en résulte pas moins de la preuve que le défendeur était au moins leur associé, et que comme tel il est responsable des dettes de cette société;

"Considérant qu'il est permis à un tiers de prouver l'existence d'une société par preuve testimoniale, et que les demandeurs pouvaient prouver par témoins que les sociétés formées comme susdit étaient simulées ou n'étaient que les prête-noms du défendeur;

"Considérant que celui qui fait commerce au nom d'un autre est responsable des obligations qu'il contracte, si le commerce est fait pour son propre compte, et si le tiers entend contracter avec lui personnellement;

"Considérant que le dit défendeur a de fait recelé et tenté de receler et soustraire, avec l'intention de frauder ses créanciers, ses biens et effets, en transportant, comme il l'a fait, en différents temps, et par différentes quantités, son fonds de commerce de St. Jean à Montréal, de Montréal à Farnham-Est, et de Farnham-Est à Sherbrooke;

"Considérant que les allégations de la requête du dit défendeur demandant la cassation du dit

bref de *capias ad respondendum* ne sont pas prouvées, mais qu'au contraire les allégations de la déposition sur laquelle le bref de *capias* a émané sont amplement prouvées," etc.

Petition rejected.

L. N. Benjamin for plaintiffs.

Greenshields, Busteed & Guerin for defendant.

SUPERIOR COURT.

MONTREAL, September 17, 1883.

Before RAINVILLE, J.

LALONDE v. ARCHAMBAULT, and LECLERC, party moving.

Quebec Controverted Election Act—Costs of witnesses.

An application was made on behalf of Joseph Leclerc, one of the witnesses summoned by the petitioner in the matter of the Verchères contested election (Quebec), praying that he be paid the amount for which he had been taxed for attendance as witness, out of the deposit made with the prothonotary as security for the costs in the cause. The suit in which the witness was examined is still pending before the Court.

The Court rejected the application on the ground that the witness had no right to be paid out of the deposit pending the suit.

Motion rejected.

Choquet for party moving.

Lacoste, Globensky & Bisailon, contra.

HOUSE OF LORDS.

November 30, 1882.

HARVIE v. FARNIE.

Domicile of Married Woman—Validity of Foreign Divorce.

Where a marriage has been duly solemnized according to the local law of the place of solemnization, the wife no longer retains any other domicile than that of the husband; and, therefore, when an Englishwoman married in England, according to English law, a foreigner with a foreign domicile, and resided with him abroad.

Held (affirming the judgment of the Court below), that the Courts of the country of the husband's domicile had power to dissolve the marriage for a cause for which a divorce could not have been granted in England, and that such decree would be recognized in England.

Lolley's case, Russ. & Ry. 237, explained.

McCarthy v. De Caix, 2 Russ. & My. 614, disapproved.

This was an appeal from a judgment of the Court of Appeal, James, Cotton and Lush, L.JJ.

reported in 6 P. Div. 35, and 43 L. T. Rep. (N. S.), 737, affirming a decision of Sir James Hannen, President of the Probate Division, reported in 5 P. Div. 153, and 42 L. T. Rep. (N. S.), 482, dismissing a petition for a declaration of nullity of marriage.

The facts of the case were as follows:

In 1861 the respondent, Farnie, married in England an Englishwoman, according to the forms of English law. He was then a domiciled Scotchman, and after the marriage he continued to live in Scotland with his wife. In 1863 a decree of divorce was pronounced against him by the Scotch court at the suit of his wife, upon grounds, which it was admitted, would not have been sufficient to sustain a petition for divorce in England. He then settled in England, and in 1865 he married the appellant, then a Miss Harvey, in England, and has continued to live there.

His first wife was still living at the date of his second marriage, and this petition was brought by the second wife for a declaration of nullity, on the ground that the Scotch decree of divorce was not, under the circumstances, binding in England.

Benjamin, Q.C., and Fooks (Webster, Q.C., with them) for the appellant, contended that the marriage of an Englishwoman domiciled in England, if celebrated in England, is an "English marriage" as defined by *Lolley's case*, Russ. & Ry. 237; 2 Cl. & F. 567, and can only be dissolved in accordance with English law. (The Lord Chancellor—Is not this case within the decision in *Warrender v. Warrender*, 2 Cl. & F. 488?) No; we say it is distinguishable. [Lord Watson referred to *Pitt v. Pitt*, 4 Macq. 627; 10 L. T. Rep. (N. S.), 626.] The precise point was decided in *McCarthy v. De Caix*, 2 Russ. & My. 614; 2 C. L. & F. 568, but the courts below declined to follow it. They referred to *Tovey v. Lindsay*, 1 Dow. 117; *Shaw v. Gould*, L. Rep., 3 H. L. 55; 18 L. T. Rep. (N. S.), 833; *Birtwhistle v. Vardill*, 2 Cl. & F. 571; 7 id. 895; *Munro v. Munro*, 7 id. 842, and argued that in all of them the manner of the dissolution of a marriage was not under consideration, but its civil consequences while still existing. They also cited *Geils v. Geils*, 1 Macq. 254; *Maghee v. McAllister*, 3 Ir. Chan. 604; *Dolphin v. Robins*, 7 H. L. Cas. 390; *Brook v. Brook*, 9 id. 193.

The effect of the respondent's contention in this case would be to overrule *Lolley's* case.

Winch and *A. Ward*, who appeared for the respondent, were not called upon.

The LORD CHANCELLOR (Selborne)—My Lords: This case has been argued by the learned counsel for the appellant at considerable length, and the legal principle involved in it is not new to your Lordships. If it were not that there has been much consideration and discussion, if not in cases in specie exactly resembling the present, yet in cases involving principles bearing upon the present, I have no doubt that your Lordships would have desired to hear the case fully argued on both sides; but looking to the nature of this particular case, and to the state of authority upon the subject, I believe your Lordship are all of opinion that it is not necessary to call upon the counsel for the respondent here. Now the ground upon which this Scotch divorce is impeached appears to be this, and this alone, that by the law of England a divorce for such a cause (adultery) as was alleged here is only granted at the suit of the husband, except under particular circumstances which in this case do not appear to have existed. The husband's adultery, without anything more, would not in England be a ground of divorce. It is a ground of divorce in Scotland, and this divorce was upon such a ground at the suit of the wife. The circumstances under which this divorce was obtained were these: The marriage had been solemnized in England, but at the time of the marriage the husband was domiciled in Scotland. That matrimonial domicile was never changed. The husband and wife lived in Scotland; the adultery was committed in Scotland, and when both parties were resident there the suit for divorce was instituted in Scotland, and a decree was regularly pronounced in those circumstances by the Scottish courts. The judge of the Divorce Court and the Court of Appeal have both held, that under those circumstances, the sentence of divorce not being impeached for any species of collusion or fraud, was the sentence of a court of competent jurisdiction, not only effectual within that jurisdiction, but entitled to recognition in the courts of this country also. On the other side it has been contended that there is a general rule of English law supposed to have been established in *Lolley's* case,

Russ. & Ry. 237; 2 Cl. & F. 567, and not to have been since departed from in such a way as to make it now otherwise than binding on this house, to the effect that if an Englishwoman is married within the limits of the English jurisdiction to a foreigner (a Scotchman being for this purpose in the same position with a foreigner), that is a marriage which the English courts must regard as indissoluble by any other than an English jurisdiction; or if not that, at all events only dissoluble in the view of an English Court, if dissolved by some other competent jurisdiction for a cause for which it might have been dissolved in England. Now I must take the liberty of saying, that if this question is to be tested upon principle apart from authority, although it cannot be denied that the varying jurisprudence, and perhaps legislation also, of different countries may and do introduce some undesirable cases of conflict between the laws of those different countries on questions of matrimonial status, yet if the question is to be approached on principle, I should certainly say that in such circumstances as those which exist in the present case all the principles of private international law point in the direction of the validity of such a sentence and of its recognition by the courts of other countries. Of course I assume that in the way of that recognition on the principle of international law, there would not be interposed any positive legislation bearing upon the point, or any positive prohibition binding upon the court in which the question arises. Upon the point of principle how does the matter stand? Let it be granted (and I think it is well settled) the general rule internationally recognized as to the constitution of marriage is, that when there is no personal incapacity attaching upon either party or upon the particular party who is to be regarded by the law to which he is personally subject, that is, the law of his own country, then marriage is held to be constituted everywhere, if it is well constituted *secundum legem loci contractus*; but that merely determines what in all these cases is the point you start from. When a marriage has been duly solemnized according to the local law of the place of solemnization the parties do become husband and wife, but when they become husband and wife what is the character which the wife assumes? She

becomes the wife of the foreign husband in a case where the husband is a foreigner in the country in which the marriage is contracted. She no longer retains any other domicile than his which she acquires. The marriage is contracted with a view to the matrimonial domicile which results from her placing herself by contract in the relation of wife to the husband whom she marries, knowing him to be a foreigner domiciled and contemplating permanent and settled residence abroad; therefore it must be within the meaning of such a contract, if we are to inquire into it, that she is to become subject to her husband's law, subject in respect of the consequences of the matrimonial relation and of all other consequences depending upon the law of the husband's domicile. That would appear to be so upon principle, and that principle followed out would certainly apply in a case like this, where the domicile into which she has married has never undergone a change, where there has been no divergence of co-habitation or residence, and where the crime was committed in the country both of the domicile and of the forum. It would appear that if this question is to depend on any principle at all, it must be upon the principle of recognizing the law of the forum and matrimonial domicile, which in this case both concur. Well now, that being my view of the plain and clear conclusion to which we shall be driven upon this subject, let us see how the matter really stands upon the authorities. There are a number of different cases which may be mentioned, and may be distinguished from each other; but as far as I know there are only two or three cases in which an appeal has been made to this house which present concurrently all the circumstances relied upon for the foundation of the jurisdiction in the present case. It is said that those circumstances existed in the case of *McCarthy v. De Caix*, 2 Russ. & My. 614; 2 Cl. & F. 568, because there the solemnization of the marriage was also in England, but the husband was a Dane. As far as I recollect, the parties lived together in Denmark as long as they lived together at all, and in the courts of Denmark, while they both lived there, a sentence of divorce was pronounced. That sentence was not for a cause, which even under the present law, would be recognized in England; it was for what abroad I think is called—or at least that is our

English translation of the foreign legal term—incompatibility of temper. But, except as to the nature of the cause of the divorce, that case would seem in its original facts to have been like the present. It is said that Lord Brougham in the case of *McCarthy v. De Caix*, decided that because the solemnization of the marriage with an Englishwoman had taken place in England, therefore the Danish court could not under those circumstances dissolve the marriage. I have great respect for the judicial decisions of all who have at any time filled the office of lord chancellor. I have great respect, also, for the high reputation of Lord Brougham; but I am compelled to speak without great respect of the decision in *McCarthy v. De Caix*, because not only does it appear to me to proceed upon a view of *Lolley's* case which is not really tenable, but also it is a decision, which upon principles universally recognized, would be incapable of being supported, even if it were true that the English court ought not to have recognized that Danish divorce; because beyond all doubt on that supposition, both the husband and the wife lived and died domiciled in Denmark, and the distribution of both their personal estates would, by a law which is beyond controversy, fall to be regulated in England and everywhere by the law of Denmark, and not by the law of England; and therefore, unless it had been ascertained that the law of Denmark under those circumstances would not distribute those estates in the same manner as if there had been a valid divorce, the decision manifestly lost sight of the true question in the cause. I do not therefore think it necessary to say more about the case of *McCarthy v. De Caix*. It has been commented upon on various occasions in a manner certainly tending to shake its authority; but to my mind, nothing more is necessary entirely to destroy its authority than to bear in mind the fact, that even if the English courts ought to have declined to recognize in that case the Danish divorce, still the English courts could not with propriety have applied the English law to the case, because the distribution of the movable property in question depended entirely upon Danish law, and the English courts were bound to treat it as depending upon Danish law; therefore the case of *McCarthy v. De Caix* may be put aside.

I am not quite sure, but I think that in the

case of *Geile v. Geile*, 1 Macq. 254, the circumstances were also parallel with these of the present case, because here, if I am not mistaken, not only was the Scotch matrimonial domicile unchanged at the time of the divorce, but I think the adultery was committed in Scotland, and I think at the time of the action brought both parties were resident in Scotland. In that case the decision of the Scotch court was upheld upon an appeal from Scotland to this house. No doubt that by itself does not show that an English court ought to have also recognized the validity of the decision; but having regard to what has constantly fallen from the judges who in this house have determined questions of that kind with reference to general principles, I think the presumption rather is, that an English court ought, unless some reason which at present I am unable to perceive be shown to the contrary, to recognize the decision of a Scotch court in a case in which this house has held that the Scotch court had proper jurisdiction to pass such a sentence.

The third case is *Maghee v. McAllister*, 3 Ir. Ch. 604, a case in Ireland before Blackburn, L. C. There, as in the Danish case, the cause of divorce was one which would not be sufficient in England, desertion and non-adherence, but the parties there also had been from the first matrimonially and actually domiciled in Scotland. They were not both in Scotland when the action was brought, and that makes it stronger. I rather think that the cause of action arose out of the fact that the wife had withdrawn herself, and she was elsewhere. Nevertheless the jurisdiction was upheld on the same principles on which this house upheld the Scotch jurisdiction in *Warrender v. Warrender*, 2 Cl. & F. 488; 9 Bl. (N. S.), 89, where the matrimonial domicile had all along been Scotch, but the crime was alleged to have been committed out of Scotland, and the wife was resident there; still this house held, in a Scotch appeal undoubtedly, that the Scotch court had proper jurisdiction; and the Lord Chancellor of Ireland, under circumstances similar in principle, held that an Irish court ought, upon principle, according to the comity of nations, to recognize the competency of the Scotch jurisdiction to pronounce the divorce which had been pronounced in

Maghee v. McAllister. I believe that those are the only cases which are in their circumstances exactly like the present case. Much of illustration and of valuable and important doctrine is undoubtedly to be found in other authorities. I will just glance at some of those authorities in order to see precisely what they do and what they do not determine. I will begin with *Lolley's case*, Russ. & Ry. 237. Now what was *Lolley's case*? It was a case of this class, that persons who had married, and had always been and always continued to be matrimonially and actually domiciled in England, had recourse to Scotland for the purpose of constituting a merely collusive domicile, and there obtained a divorce for a crime, I take it, committed in Scotland. It was held by the English courts that that was not a valid sentence. I do not myself think that there was certainly any great hardship upon Mr. Lolley, the husband, because, whether there was collusion on the part of his wife or not, it is quite certain that he went through the whole proceeding in order to get rid of his wife and marry another woman, with whom he had already entered into a conditional engagement. But there was a total absence of matrimonial or actual domicile. We need not consider whether a change of domicile would or would not have been sufficient. The domicile was throughout English, and the recourse to Scotland was merely for the purpose of getting rid of the marriage. That case decided, and every subsequent case is consistent with the decision, that in those circumstances the Scotch Court had no proper jurisdiction, or at all events not such a jurisdiction as could be recognized as giving any effect to its sentence in England. There arose a somewhat similar question in the case of *Tovey v. Lindsay*, 1 Dow. 117, and it is remarkable that there Lord Eldon did, in the course of the argument, according to the report which I hold in my hand, once or twice before he came to deliver judgment, express himself in terms not different from the terms used at your Lordship's bar, by the learned counsel for the appellant, as to the point decided in *Lolley's case*. He is reported to have said, on page 124 of the report, that the twelve judges had lately decided, that as by the English law marriage was indissoluble, a marriage contracted in England could not be dissolved in any way except by an act of the legislature, which is very much the way in which Mr. Benjamin put it. And again, on the top of the next page, "You say that the marriage ought to be dissolved. Her answer to that is, that being contracted within the pale of the English law, it is indissoluble." So that Lord Eldon during the argument once or twice expressed himself, with regard to *Lolley's*

case, in the terms of the appellant's argument in this case; but when he came to deliver his judgment, it is quite plain that upon mature consideration he saw reason to take a different view. The material facts there were these: The original domicile of the husband was Scotch; he had afterwards lived a good deal in England, particularly in Durham. He had separated from his wife. His wife remained at Durham, and he afterwards sued her for a divorce in Scotland, she being out of the jurisdiction, and there being no *corpus delicti* in Scotland. The Scotch courts had treated it as a confessedly Scotch domicile. Lord Eldon in the whole of his judgment treats domicile as the point upon which the question ought properly to depend; not however ultimately deciding anything, and certainly not deciding the very important question which might have arisen if the change to an English domicile had been established, namely, how far a subsequent change of domicile would affect the jurisdiction to dissolve the marriage; but he considered the fact of domicile to be necessary to be ascertained, which according to the view of *Lolley's* case taken by the appellant's counsel at your Lordship's bar, could not possibly have been necessary at all. Therefore I think we may infer very clearly that in Lord Eldon's mind it could not be determined off-hand that the Scotch court had no jurisdiction merely on the ground that the marriage had taken place in England. Then I come to observe upon two other classes of cases, or rather one other class, because really *Dolphin v. Robins*, 7 H. L. Cas. 390, and *Shaw v. Gould*, L. Rep., 3 H. of L. 55; 18 L. T. Rep. (N. S.), 833, seem to me to be very nearly the same in their circumstances as *Lolley's* case, and I will not therefore dwell upon those cases. The other class of cases is that which was last mentioned, namely, *Niboyet v. Niboyet*, 4 P. Div. 1; 39 L. T. Rep. (N. S.), 486, where the forum which dissolved the marriage was not that of the matrimonial domicile, but was that of the *bona fide* residence of both parties, both being within the jurisdiction, and the crime having been committed there. Now if that case was well decided, it is not certainly an authority in the appellant's favor, because it goes to this length, that at all events under the English statute, if those circumstances are found concurring, even domicile is not necessary to give jurisdiction to dissolve a marriage. Whether or no another country, the country of those parties (France, I think), would have recognized the decision we need not at present inquire, because either it is applicable, on the present occasion, or it is not. If it is applicable, it is certainly an authority against the appellant; if it is not applicable, it does not really help her. The case of *Pitt v. Pitt*, 4 Macq. 627; 10 L. T. Rep. (N. S.), 626, no doubt was a case which did not unite the circumstances which your lordships have to consider here, because, in *Pitt v. Pitt*,

in which this house on an appeal from Scotland reversed an order, which had affirmed the jurisdiction of the Scotch court, and therefore determined that the court had no jurisdiction, the circumstances were these: "The matrimonial domicile was English, the solemnization of the marriage was in England. Mr. Pitt, the husband, had gone to Scotland. It was in controversy whether he had there acquired an actual domicile or not, but it was decided that he had not. He therefore retained his English domicile. The wife was not in Scotland, and alleged adultery was not committed in Scotland. In those circumstances the house came to the opposite decision from that which it had arrived at in *Warrender v. Warrender ubi sup.*, the circumstances being very parallel, except that in the one case there was, and in the other there was not, a Scotch domicile. In *Warrender v. Warrender*, where there was a Scotch domicile, the jurisdiction was upheld, though the crime had not been committed in Scotland, and though the wife who was the defender, was not resident in Scotland. In *Pitt v. Pitt*, the jurisdiction was denied, because there was not a Scotch domicile, the other circumstances being the same. Now, I do not say that the case of *Pitt v. Pitt* would of necessity govern cases like *Niboyet v. Niboyet*, for example, if they were to arise in Scotland. That is not a question which your lordships have now to determine, and it is not desirable that you should go beyond the case which you have to determine; but this I will say, without going through the authorities, or all the cases which have been cited, that when they are carefully examined you find that the current of the best authority which pervades them is in favor of regarding and not disregarding international principles upon this subject, when you do not find the positive law of the country where the forum is in conflict with those principles, unless *McCarthy v. De Caiz* may be considered to be an exception. The present decision in the Court of Appeal is in accordance with international law and with the whole stream of sound authority, including Lord Lyndhurst, Lord Brougham himself (though no doubt from the view which he took of *Lolley's* case he not infrequently contended against it in terms which your Lordship probably would not unreservedly adopt), Lord St. Leonards, Lord Westbury, Lord Cranworth, Lord Chelmsford and Lord Kingsdown, all of whom concur. I have no hesitation in saying, that from the passages which have been read from the judgments of each and every one of those noble and learned Lords, I should confidently infer, that if the present case had been argued before all or any one of them, they would have concurred in the judgment which I now move your lordships to pronounce, which is, that the present appeal be dismissed with costs.

LORD BLACKBURN and LORD WATSON concurred.
Appeal dismissed.

The Legal News.

VOL. VI. SEPTEMBER 29, 1883. No. 39.

"COUNTRY DAY" IN TOWN.

A day is fixed during the appeal term in Montreal for the hearing of cases from districts other than the district of Montreal. This is an arrangement manifestly necessary to prevent the waste of time which would be occasioned by keeping counsel from the outside districts ten or twelve days in the city, waiting for the chance of their cases being called. Of late, however, "country day" has come to mean the day on which country cases will not be heard. For two or three terms past, country day has come and gone, without any of the counsel from the St. Francis and other outside districts getting a chance of being heard. The cause of this untoward event usually is that a lengthy city case has been commenced a few minutes before the adjournment on the previous day. Now it is a very small inconvenience to suspend a city case, because the counsel are on the spot, and it is a matter of indifference to them to argue a case on the Tuesday or the Wednesday; but the Court in their wisdom have decided that the case commenced shall go on, in spite even of the courteous offer of city counsel to waive their supposed privilege and to await the next day, and thus the entire outside bar have been compelled to dance attendance on the chance of being heard on that or the next day. This is neither courteous nor reasonable, and as we often hear of the supposed antagonism between law and common sense, we think the members of our highest provincial tribunal would do well to hesitate before perpetuating an arbitrary ruling which places them at a painful disadvantage when their conduct is regarded from a common sense point of view. During the September term, the inconvenience was still farther aggravated by the fact that after "country day" (Tuesday, Sept. 25), had been occupied by a city case, the best part of Wednesday forenoon (Sept. 26) was consumed in the delivery of judgments.

SURETISHIP.

The case of *Canada Guarantee Co. & McNichols* (4 L. N. 78) has had an unsatisfactory termination. It is one of those cases which add emphasis to the banal expression as to the "glorious uncertainty of the law." The question was whether a bond given generally by an official assignee for the faithful discharge of his duties as such could be taken advantage of by the creditors of an insolvent estate who have elected to make him administrator of the estate as creditors' assignee. The weight of opinion is overwhelmingly in favor of the negative of this proposition. In Ontario the law seems to have been considered so clear that the point was never taken before the Court of Appeal and the ruling of Chief Justice Hagarty, holding that the terms of the bond could not be extended, was regarded as so conclusive that no appeal was taken from his decision. In Quebec Mr. Justice Jetté rendered judgment in the same sense, and no appeal was taken from the decision. In the case of *Canada Guarantee Co. & McNichols*, the Court below seems to have leaned in the same direction, but in deference to a contrary decision by the senior Judge of the district, the suretiship was held to be extended under the circumstances from the official assignee to the creditors' assignee. That case was taken to appeal, and both the Chief Justice and Mr. Justice Ramsay consider it erroneous and untenable. A bare majority of one hold in favor of extending the responsibility of the surety, and as the amount is too small for an appeal the matter ends here. Unfortunately, there are a number of other suits depending on the decision in this case, and they must abide the unsatisfactory and, we believe, erroneous conclusion just noted. The decision professedly turns merely upon the interpretation of a clause of the Insolvent Act which has been abolished, but the principle sinned against by this judgment lies deeper than any statutory law, and the decision will hardly, we think, command much respect hereafter as a precedent on the law of suretiship. It may be added that in a much more doubtful case (*Consolidated Bank & Merchants Bank*, 6 Legal News, p. 284), the Court of Appeal has recently refused to extend the obligation of a surety.

THE IRISH LORD CHANCELLORSHIP.

Sir Edward Sullivan has been appointed to the office of Lord Chancellor of Ireland in succession to the Right Hon. Hugh Law, who died a few days ago. The Irish Chancellorship, it has been remarked, has been held by some famous men—men of the successful type. Of those who have had the custody of the great seal of Ireland since the Revolution, at least ten have founded families. Their representatives in the peerage of to-day are Lords Methuen, Normanby, Middleton, Roden, Lifford, Redesdale, Manners, Plunket, Stratheden and Campbell, and St. Leonards. The only two in the list who sat on the English woolsack—Lords Campbell and St. Leonards—succeeded each other as heads of the law in Ireland, though Sir Edward Sugden had been once Chancellor of Ireland before he took Campbell's place in 1841. Campbell's appointment has been spoken of as a "job" intended to give him a retiring pension of £4,000 a year: but it should not be forgotten that Campbell declined the pension.

The fame of the Irish Chancellor has been, as a rule, of a rather local kind. Lord Methuen, for instance, is known in history chiefly for his achievements as a diplomatist. He it was who negotiated the treaty with Portugal which bears his name, and which did more than anything else to make England for upwards of a century a port-drinking nation. John Fitzgibbon, Earl of Clare (Chancellor from 1789 to 1802), is also known on the English side of St. George's Channel. His last male descendant was killed at Balaklava. George Ponsonby (1806-7) became leader of the Whig party in the House of Commons on Lord Grey's ascension to the Upper House. He died in 1817. Thomas, Lord Manners (1807-27), had previously been a baron of the English Exchequer. Sir Anthony Hart (1827-30) had been Vice-Chancellor of England. Perhaps the greatest name in the list is that of the Irish Demosthenes, Lord Plunket, who was Chancellor from 1830 to 1834, and again in 1835 to 1841.

THE LATE MR. EDWARD CARTER, Q.C.

The bar of this Province has sustained a serious loss in the sudden but not altogether unexpected demise of Mr. Edward Carter, Q.C., who, like his late contemporaries, Messrs.

Andrew Robertson, Q.C., and T. W. Ritchie, Q.C., has died in harness. Mr. Carter was only 61 years of age, but nearly forty of those years were passed in the most active exercise of his calling. In the law courts he was a powerful advocate of the interests of his clients, seldom or never allowing a point of vantage to escape him. In his arguments and addresses to juries he was rapid, almost voluble, but at the same time his delivery was agreeable and his reasoning acute and logical. He never failed to leave a clear impression upon the minds of his hearers of the points which he wished to urge. He was rather admired by his confrères at the criminal bar for the subtlety of his attacks upon indictments, and as a counsel for the defence was a terror to limping crown prosecutors. It would, however, be a great injustice to Mr. Carter to suppose that his abilities were restricted to ingenious defences. He was well read in all branches of the law, and as counsel for insurance and other corporations had a high repute. He would have adorned the bench, and the repose from the strenuous and exhausting contentions of the bar would probably have added ten years to his life. But it was not to be. Mr. Carter appeared in the Queen's Bench (Crown side) but a few days before his death, and argued with his usual energy and perspicacity, but his strength had long been undermined by chronic indisposition, and a brief illness, which a more robust constitution would have quickly shaken off, sufficed to carry him to the realm where contention is at an end.

In private life Mr. Carter was the courteous gentleman, and of a generous and sympathetic disposition. His only deviations from the hard line of professional work were his acceptance for a short time of the office of Clerk of the Peace in Montreal, and his subsequent representation of Montreal Centre in the Local Legislature. In 1871 he was defeated in a contest with the late Mr. Holton, but soon after he was elected by acclamation to the House of Commons for Brome, when the seat became vacant by the elevation to the Bench of the late Judge Dunkin. At the general election in 1872 he was re-elected and sat until 1874, when he did not again come forward.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, September 27, 1883.

LA BANQUE D'HOCHELAGA (defendant below),
Appellant, and ROBERTSON (plaintiff below,
Respondent.

Banking Act—Calls on Stock.

Under 37 Vic. c. 5, s. 34, there must be an interval of thirty days between the making of the calls, as well as an interval of thirty days between the dates fixed for payments.

The action was to set aside, as irregular and illegal, a resolution of the bank directors, passed on the 27th October, 1880, which forfeited for non-payment of calls the shares of certain shareholders. The respondent held 50 shares, on ten of which 90 per cent. had been paid up, and on the remaining 40 shares 50 per cent. had been paid, and these shares had been declared forfeited by the resolution above mentioned. It was alleged in support of the action that the calls and notices were irregular and insufficient. The Court below held that the respondent had not been regularly put *en demeure*, and that the confiscation was unreasonable and illegal. The action was therefore maintained, and the bank was ordered to reinstate the respondent in his fifty shares.

Béique, for the appellant, contended that the notices of calls had been regularly given. The respondent had not made any payments on account of the stock himself; the amount paid on it was paid before he acquired it, and the reason why the calls were not responded to was the low price of the stock in the market. The price afterwards advanced, and then the respondent became anxious to claim the stock.

... and that besides other irregularities the directors of the bank had undertaken by their resolution to make seven calls. This point had been decided by the Court of Appeal in the case of *Gilman & Court*, in which it was held that under section 58 of the Banking Act of 1871, the assignee of the Mechanics' Bank could only make calls not exceeding twenty per cent. each, at intervals not less than 30 days. Section 34 which governs the calls in this case, was practically the same. The respondent, while protesting against the

irregularity of the calls, had offered the bank the money claimed by it with interest in order that there might be no excuse for refusing to consider him a shareholder.

RAMSAY, J. This is an action by the respondent, demanding that the confiscation of certain stock belonging to him in the Hochelaga Bank be declared null, and that the bank be ordered to reinscribe the name of plaintiff amongst its shareholders.

The declaration sets up that the respondent held fifty shares of \$100 each in the stock of the bank, on ten shares of which 90 per cent. had been paid up, and that on the other forty shares fifty per cent. had been paid up. That the confiscation was for the non-payment of pretended calls, seven in number; that these calls had been irregularly made, and that he had no notice of confiscation, but, on the contrary, that he had special notice that he would be sued to compel him to pay.

What really happened was this: On the 25th of July, 1874, a resolution was passed making seven calls, namely, the 4th, 5th, 6th, 7th, 8th, 9th and 10th calls, payable respectively 1st September, 1874, 2nd January, 1875, 1st May, 1875, 1st September, 1875, 2nd January, 1876, 1st May, 1876, and 1st September, 1876. That these calls were published in English and French, and a notice sent to each shareholder. Several shareholders, and among them the respondent, did not pay all these calls, and on the 21st January, 1880, the directors met and passed this resolution:—"Il est résolu de donner avis dans la *Gazette Officielle* aux actionnaires qui n'ont pas encore payé les 3ème, 4ème, 5ème, 6ème, 7ème, 8ème, 9ème et 10ème versements de 10 par cent. chacun sur les actions par eux souscrites, tant dans la première que dans la deuxième émission du fonds capital de cette banque, qu'ils sont requis de payer les dits versements dans les bureaux de cette banque, à Montréal, comme suit:—

Le 3ème versement de 10 par cent. le 6 Mars prochain.
Le 4ème versement de 10 par cent. le 6 Avril prochain.
Le 5ème versement de 10 par cent. le 7 Mai prochain.
Le 6ème versement de 10 par cent. le 7 Juin prochain.
Le 7ème versement de 10 par cent. le 7 Juillet prochain.
Le 8ème versement de 10 par cent. le 7 Aout prochain.
Le 9ème versement de 10 par cent. le 7 Septembre prochain.
Le 10ème versement de 10 par cent. le 7 Octobre prochain.
Et qu'en outre un avis soit envoyé à chacun

des dits actionnaires, leur faisant part de la résolution de ce bureau, en accord avec une résolution des actionnaires passée le 15 de ce mois, de prendre des procédés légaux pour le recouvrement des dits versements dans le cas où ils ne seraient pas payés, le jour et au lieu mentionnés plus haut."

Now it is contended—1st, that this is not a resolution making a call, but a resolution to give notice that a call should be made; 2nd, that if it is a call it is a new call, and that it abolishes the old one; 3rd, that a call cannot be made in block in this way, but that thirty days should elapse "before the making of each call," and 4th, that thirty clear days did not elapse between the times of payment of each instalment. The argument is based on the following words of the Act relating to Banks and Banking (37 Vic. c. 5), section 34: "Provided that such calls shall be made at intervals of not less than thirty days, and upon notice to be given at least thirty days prior to the day on which such call shall be payable; and no such call shall exceed ten per cent. of each share subscribed." These words then clearly require two things; 1st, that calls are to be made at intervals of not less than thirty days, and 2nd, upon notice given at least thirty days prior to the day on which such call shall be payable. In the case of *Gilman & Court* it was formally decided that there must be the interval of thirty days in making the calls as well as thirty days at least between the payments. If we take the resolution of the 25th July, 1874, there were no intervals in making the calls; and if we consider the resolution of the 21st January, 1880, to be the basis of the call it is open to the three objections, in its form it is not a resolution to call up, but to give notice, still they advertise it as "a new call," there are no intervals in making the new call, and the days of payment do not allow at least 30 days to elapse between. The right to forfeit is to be strictly construed, and we cannot go beyond the statute. The authorities on this point are numerous and uniform.

As to the question of want of notice, it is not necessary that I should express any opinion in this case. I may say, however, that where there is a failure to do, it seems to me to be a fair thing to exact notice before forfeiture, but the very meagre section of our statute

does not require it. In the English Companies Act of 1862, the procedure prior to forfeiting is elaborated with much care (25 and 26 Vic., c. 89, sec. 1, table A, 17). But in *Lapierre v. L'Union St. Joseph*, we decided that although there was no mention of prior notice in the statute on which forfeiture was based, still by the principles of our law in cases involving the failure to do, where there is a vested right to be taken away, good faith requires a prior notice. This case was reversed in the Supreme Court on the ground that the want of notice was not pleaded. (4 Supreme Court Rep. 164). So that our judgment on that point stands unimpaired. But the difficulty here is that there were numerous notices and promises to pay, followed by a calculated abstention from carrying out these promises, but there was no notice specially saying which of the remedies given the company by law would be adopted.

On the ground, then, that in making the calls the terms of the statute were not strictly followed, I am of opinion that the forfeiture was not incurred. To this judgment Mr. Justice Monk dissents on the ground of waiver by respondent, inasmuch as it appears he was present at the meeting at which the calls were made and that he paid a part of the calls. But I don't think this can be considered such a waiver of these irregularities as would justify so extreme a measure as the confiscation of respondent's stock. It might, perhaps, be a good answer to an action if he had brought it to get back the money he had paid. But respondent had a right to refuse to go on paying calls whenever he discovered they were not binding on others. I am, therefore, to confirm, and this is the decision of the majority of the Court.

Judgment confirmed, Monk, J., *diss.*

Beique & McGown for appellant.

Maclaren, Leet & Smith for respondent.

SUPERIOR COURT.

MONTREAL, September 13, 1883.

Before LORANGER, J.

McGILLIVRAY v. PARKER.

Sale—Defects in goods sold—Custom of trade.

A usage of trade, to be considered binding, must be general, and the facts adduced to prove its existence must be consistent and repeated and pub-

likely apparent during a reasonable length of time.

The action of the plaintiff was for the price of goods sold and delivered to the defendant.

The defence was that there was a deficiency in quantity, and that defects were discovered in the goods, of which the plaintiff had notice, and a deduction of \$69 was claimed.

PER CURIAM. [After stating the facts and pleadings]. Le défendeur a-t-il prouvé que les marchandises qui lui ont été livrées à partir du deux au vingt février n'avaient ni la qualité ni la quantité voulue, et a-t-il établi le quantum de sa réclamation? Cette preuve a-t-elle le degré de certitude nécessaire pour l'admettre à faire valoir à l'encontre du prix d'un dernier achat, les imperfections ou les défauts de marchandises qui lui avaient été vendues longtemps auparavant, et dont il avait eu la possession sans se plaindre, pendant plusieurs semaines. Comme je l'ai dit plus haut, si ce n'était l'écrit du 27 février, le défendeur serait non recevable à réclamer les diminutions et les dommages dont il se plaint, sans une preuve bien certaine. Or, admettant que cet écrit n'aurait pas été consenti, la preuve du défendeur serait-elle suffisante pour maintenir sa réclamation? Je ne le crois pas. En effet en quoi consiste-t-elle? Le défendeur a fait mesurer par deux de ses employés un certain nombre de pièces de marchandises, dans lesquelles ils prétendent avoir constaté des diminutions dans le mesurage et des imperfections dans le tissu, consistant soit en des trous, des nœuds ou la discoloration de l'étoffe; mais aucun d'eux ne peut dire la quantité de pièces ainsi mesurées, ni les identifier sur les envois produits. Ces témoins sont certains que les marchandises qu'ils ont examinées sont bien celles que l'on trouve détaillées dans les envois 1, 2, 3, 4, 5, 6, 7, 8 du défendeur, mais quand on leur demande de les identifier sur les envois mêmes, ils se déclarent incapables de le faire. Le défendeur était dans l'habitude de faire des achats chez le demandeur de marchandises semblables depuis longtemps et en avait reçu dans les mois de janvier précédent, et jusqu'à la date du 10 février. Le nommé Martin déclare qu'il a mesuré des marchandises livrées avant cette dernière date. Le défaut d'identification des marchandises mesurées le 27 et le 28, joint à ce fait, rend incertaine la preuve de ces

deux témoins sur ce point important. Il est vrai que leur mesurage a été vérifié par d'autres témoins du défendeur, mais ceux-ci sont des étrangers, qui ne savent pas par eux-mêmes d'où proviennent les marchandises en question. Cet examen a eu lieu *ex parte* pour la plus grande partie, le demandeur n'ayant été présent que pendant un très-faible espace de temps à l'examen, et il n'existe aucune identification des marchandises examinées en sa présence. Le demandeur se trouve ainsi à la merci du défendeur, et il est en droit d'exiger une preuve certaine. Mais il y a plus, non-seulement il n'existe aucune preuve de l'identité des marchandises en question, mais le défendeur n'a point établi le quantum de sa réclamation. On trouvera dans son exhibit onze l'état de compte sur lequel il appuie cette réclamation. Outre trois items pour diminution dans la quantité, le reste consiste en dommages résultant des imperfections de l'étoffe. Or voici comment les commis du défendeur ont procédé pour établir le quantum de ces dommages. Chaque fois qu'ils trouvaient dans une pièce d'étoffe des taches, des trous ou autres imperfections, ils découpaient de la pièce un quart de verge et en chargeaient le prix au demandeur, et c'est de cette manière, sauf les trois items ci-dessus mentionnées, qu'ils ont réussi à établir un chiffre de \$69.00. Ce compte a été fait *ex parte* comme je viens de le dire, et il était très-naturel que le demandeur s'enquit par quelle autorité le défendeur avait pris cette base d'opération. On répond que tel est l'usage du commerce en semblable matière, et c'est sur cet usage que le défendeur fait reposer sa cause.

Or la preuve sur ce point est bien contradictoire. Pour qu'un usage soit considéré comme existant et obligatoire, il faut qu'il soit général, et que les faits invoqués pour en établir l'existence soient multiples et uniformes, qu'ils se soient longtemps produits d'une manière non clandestine et pendant un certain laps de temps.

Dans l'espèce comment cet usage a-t-il été établi? Par des commis et le frère du défendeur, et sauf un marchand de Toronto, aucun manufacturier ou marchand de ce genre de commerce, n'ont été entendus de la part du défendeur. Graham, Stebens, Rowell, Murphy, sont tous des commis, le nommé Wilby seul est un manufacturier, de la province d'Ontario, et son témoignage unique sur les usages du

commerce de cette province serait insuffisant.

D'un autre côté le demandeur a fait entendre le nommé Borne, gérant du département des draps de la Co-operative Association, Huston et Smith, marchands de hardes, et tous s'accordent à dire qu'ils ne connaissent pas semblable usage. Huston, il est vrai, déclare que le manufacturier fait une marque sur les pièces de marchandises endommagées et qu'une déduction d'un quart de verge est faite sur le ticket, mais il ajoute que cela ne s'applique pas aux marchandises de qualité secondaire. Les autres s'entendent pour déclarer que pour des marchandises à bas prix, on ne fait aucune déduction pour les défauts de la nature de ceux dont le défendeur se plaint.

Les marchandises en question sont des marchandises pour hardes d'une valeur au-dessous de la moyenne. En présence de cette preuve contradictoire, comment reconnaître que l'usage invoqué par le défendeur a été suffisamment établi ?

Le défendeur ayant failli dans cette preuve, il reste sans preuve sur le quantum des dommages qu'il réclame. Quant aux trois items réclamés pour diminution dans la quantité, le défendeur n'a point prouvé que les pièces de marchandises ainsi réduites, faisaient partie des envois qui, aux termes de l'écrit du 27 février dernier, étaient sujettes à examen.

On a prétendu que les offres étaient insuffisantes. Il y a à cette objection une réponse sans réplique. Le demandeur a admis qu'on lui a offert de l'argent et a déclaré qu'il n'aurait rien accepté au-dessous du montant de son action. Il est donc sans intérêt à se plaindre de l'insuffisance des offres.

Je suis sur le tout d'opinion que le défendeur n'a point prouvé les allégués de sa défense et le demandeur a droit à son jugement pour le montant réclamé par son action.

Stephens & Lighthall for plaintiff.

Greenshields & Co. for defendant.

COUR DE CIRCUIT.

MONTREAL, 21 septembre 1883.

Coram MATHIEU, J.

LORD V. HUNTER et al.

Cheque—Présentation—Endosseur.

Le 29 juillet 1882 J. S. Hunter fit à Montréal son chèque en ces termes :

" Montréal, 29 juillet 1882.

" Au gérant de la Banque Union du Bas Canada :

" Payez à T. J. Church, Ecuyer, ou ordre, soixante-et-quinze piastres (\$75.00).

" (Signé) J. S. HUNTER."

Le même jour ce chèque fut remis à T. J. Church qui l'endossa et le remit le même jour à Antoine G. Lord. Il a été prouvé par un témoin que le chèque avait été présenté à la Banque Union environ douze jours après sa date, et que le paiement en avait été refusé faute de fonds. Il a été de nouveau présenté le 22 août 1882, et ce jour-là il fut protesté et avis de ce protest fut donné à T. J. Church l'endosseur. Hunter a laissé la province et Lord a, le 6 septembre 1882, poursuivi Church pour le recouvrement du montant de ce chèque et du coût du protest.

Jugé : Que le chèque n'ayant pas été présenté le lendemain du jour où il était fait payable, le demandeur devait prouver qu'il n'y avait pas de fonds le lendemain où il a reçu ce chèque, et que le défaut de présentation légale n'a pas porté préjudice au défendeur, et que Lord n'ayant pas fait cette preuve son action doit être déboutée.

Que l'endosseur d'un chèque comme l'endosseur d'une lettre de change doit avoir avis de sa présentation légale le lendemain du transport du chèque, et que s'il ne le reçoit pas il est absolument déchargé.

Action déboutée.

A. Desjardins for plaintiff.

E. A. D. Morgan for defendants.

ECCLESIASTICAL DISCIPLINE.

The following account given by the Ecclesiastical Commissioners in their report of the methods of enforcing ecclesiastical discipline in several Churches not in communion with the Church of England, will be read with interest :—

The constitution and authority of the established ecclesiastical courts in Scotland, were recognised and confirmed by the Act appended to the treaty of union (1707), in which it is provided that " . . . the Presbyterian Church government and discipline—that is to say, the government of the church by kirk sessions, presbyteries, provincial synods, and general assemblies . . . shall remain and continue unalterable."

The Court of First Instance is the presbytery, a permanent body, composed of the ministers of the different parishes within defined bounds and of elders elected by each kirk session. The

kirk session, which is the primary element of the ecclesiastical system, is established in each parish, and consists of the parish minister as chairman and a certain number of laymen specially ordained to the eldership.

An appeal lies from the presbytery to the provincial synod of the district within the bounds of which the presbytery is situated. This synod consists of representatives of the different presbyteries included in the district, each kirk session sending its parish minister and one or more elders. The ultimate appeal lies to the general assembly, which is composed of representatives elected annually by every Presbytery in the Church, by the four Universities, and by the Royal Burghs. It consists of about 440 members, in the proportion of about 260 ministers to 180 elders. A Lord Commissioner, as representing the Crown, takes part in the meetings of the General Assembly; but the constitutional limits of his power are not exactly determined. When the Lord Commissioner dissolved the General Assembly in 1692 without naming another day for its meeting, he was met by a solemn protest from the Moderator, who affirmed "that the office-bearers in the house of God have a spiritual intrinsic power from Jesus Christ, the only head of the Church, to meet in assemblies about the affairs thereof, the necessity of the same being first represented to the magistrate." The assembly then fixed a day for their meeting. They did not meet on that day; but having been summoned by the King's writ, they met in 1694, and continued to sit regularly during the rest of the reign of William III.

The Church courts in Scotland have no executive power of their own for enforcing the civil consequences of their judgments; but the judgments can be forced by application to the civil court, which would, as a matter of course, give effect to them. And it is believed that in no case would the civil court entertain an appeal from a judgment of an ecclesiastical court on a question of doctrine, or enter on an examination of the soundness of such a judgment before enforcing its civil consequences; or, when a case is clearly within the province of the Church courts, interfere upon an allegation that the forms of ecclesiastical procedure had not been observed.

At the same time it is allowed that cases might arise of such flagrant departure from the

"form and purity of worship" established by the Act of 1707 as might be held to constitute a violation of the provisions of that Act, and consequently to justify on the failure to obtain redress from the General Assembly, an appeal to the civil court.

In Russia complaints against ecclesiastics are brought in the first place to the bishop. His preliminary decision is examined by his Consistorial Court, which constitutes a Court of First Instance, and their decision, together with the opinion of the minority of the court, if the court is not unanimous, is submitted to the bishop for confirmation. The consistorial courts consist of three to five ecclesiastics appointed by the Holy Synod with a staff of lay officials.

The consistorial courts appear to have complete and independent jurisdiction over the cases which fall within their cognizance. Their punishments "partake more of a moral character." Contumacy against their decisions is visited by temporary suspension or consignment to a monastery until repentance.

If a priest has been sentenced to deprivation he can appeal either to the Consistorial Court which decided the case or directly to the Holy Synod. A sentence of degradation from the ministry requires to be confirmed by the Synod. The Holy Synod has supreme authority, under the Czar, over all ecclesiastical affairs. It was constituted in 1721 by Peter the Great to exercise the authority and enjoy the privileges before vested in the patriarch. The language of the Emperor's edict is as follows:—"We appoint a Spiritual College, *i. e.*, a Spiritual Syndical Administration, which is authorized to rectify according to the regulation here following, all spiritual affairs throughout the Russian Church. And we require all our faithful subjects of every rank and condition, spiritual and temporal, to account this administration powerful and authoritative. * * * * * We constitute members of this Spiritual College, as is here specified, one president, two vice-presidents, four counsellors, four assessors. The number of members has been since varied. It was fixed at six in 1763, and at seven in 1818, with "power to add to their number."

The judgment, when finally pronounced, is carried into execution by the Consistorial Court.

The peculiarity of the Russian system lies in

the exceptional position of the Czar, who is personally supreme over all civil and ecclesiastical procedure. The members of the Holy Synod are chosen and appointed by him, and his relation to it does not appear to be defined by any legal instrument. The Czar exercises, in some cases directly, powers which properly belong to an ecclesiastical tribunal, but generally he acts through the synod. "In the synod he is represented by a high official (Chief Procurator), who has a negative on all its resolutions till laid before the Emperor," and this officer, though he has theoretically no voice in the deliberations of the synod and no vote, practically exercises a powerful influence upon its decisions. The synod cannot in fact give effect to any of its decisions without the Emperor's consent, given through his representative.

The extent and character of the Imperial interference with the wishes of the synod at any time might, no doubt, be determined in some degree by public opinion within the Russian Empire, and in grave cases by the expressed or expected judgment of the four eastern patriarchs: but in the empire itself there is no constitutional check on such an exercise of the Czar's personal authority as that by which Peter the Great abolished the patriarchal power in Russia. The indefinite relation of the ecclesiastical to the Imperial power, determined only by general expressions of respect for early precedents, corresponds with the peculiar circumstances of the nation. The Czar is necessarily unwilling to limit his own authority, and the synod may shrink from the danger of being formally forced to accept a position inconsistent with spiritual freedom.

In the older provinces of the Kingdom of Prussia the eight provincial Consistories, each consisting partly of legal members from 6 to 14 in number, with a legal president, form Courts of First Instance. If the charge be one of false doctrine, the members of the Provincial Synodal Committee, a body of ecclesiastics and laymen, freely elected from the Synods of each province for three years, are joined to the Consistory with equal rights of voting.

An appeal from the judgment of the Consistory lies to the Evangelical Supreme Council, a mixed body of ecclesiastics and laymen, by which the final decision is given.

There is no appeal from the Ecclesiastical

Court to a Civil Court; but in certain cases it is permitted, under the name of appeal, to address a remonstrance on account of misuse of ecclesiastical authority to a Civil Court, the Royal Tribunal for Ecclesiastical Affairs. This court has either to reject the appeal or else to cancel the disputed sentence of the ecclesiastical authorities. It has no right to give a decision of the case itself, or to issue a separate disciplinary sentence.

In France the discipline of those clergy of the Roman Catholic church who have a permanent position depends almost entirely upon their voluntary and loyal obedience to their spiritual rulers. The Church possesses no coercive jurisdiction, and there is no external power to execute a sentence given by an Ecclesiastical Court against a priest. One article only of the penal code may be applied, which punishes the individual who wears a costume which he has no right to wear. This article has often been enforced on priests who have been forbidden by the ecclesiastical tribunal to wear the habit of priest.

The priest in charge of the churches of the chief places in the "canton" (*églises cantonales*) have alone a fixed tenure, and are alone legally styled *curés*. All the other clergy hold their charges absolutely at the will of the bishops, who have, however, to inform the Government of the changes which they make in their dioceses by the appointment or the removal of clergy.

The cases in which the civil courts can interfere in ecclesiastical matters in France, under the present laws, are more numerous than is commonly supposed. In addition to cases which fall under the *appel comme d'abus*, the articles 199 sqq. of the Penal Code are capable of severe application against the clergy, but they appear to be commonly disregarded in some particulars with impunity, though it is said that convictions occur almost every year for breaches of the code. The synods and consistories of other religious bodies in France are composed of clerical and lay members in general chosen by themselves; but in the case of the General Consistory of the Lutheran Church, the president and two ecclesiastical members are named by the Government. These synods appear to have complete control over the internal discipline and administration of the bodies which they represent, but all their decisions, of whatever kind, are submitted to the approbation of the Government; nor can they meet without the permission of the civil authorities. The duration of the sessions of the general synods is limited to six days.

The Legal News.

VOL. VI. OCTOBER 6, 1883. No. 40.

EXTRADITION.

We notice by a case mentioned in an American contemporary, *State v. Vanderpool*, Weekly Law Bulletin, Ohio, vol. 10, p. 170, that a point of some interest has been decided by the Supreme Court of Ohio. Under the treaty of 1842 between the United States and Great Britain, certain prisoners were extradited from Canada and taken to Butler county, Ohio, for trial. They were there convicted and sent to the Penitentiary for the crime for which they had been surrendered. While serving out their sentences they were indicted in Belmont county for forgery committed prior to their extradition. Forgery is an extraditable offence under the treaty; but the Court held that as the prisoners had not been extradited for that crime they could not be tried for it in Belmont county until they had served out their sentence on the charge for which they had been surrendered by Canada, and had had a reasonable time to leave the State.

MISUSE OF TITLES.

In connection with the subject adverted to on p. 66 of this volume, as to the common misuse of titles, the following extract from an article by Mr. Freeman in the current number of *Longman's Magazine*, is not without interest and pertinence on this side of the Atlantic:—

"It is indeed a strange result of lessening the number of cathedrals and collegiate halls that, ever since that change, the land has swarmed with canons as it never did in any earlier age. The caputular members of the new foundations used to be called prebendaries; but nobody talked of 'Prebendary A.'; they were satisfied to be 'Mr.' or 'Dr.', as might happen. Now their style is 'Canon,' and every one of them is called 'Canon' this or that. A witty canon of St. Paul's, a learned prebendary of St. Peter's, would have thought it strange to be called 'Canon Smith' and 'Prebendary Milman'; their successors are all 'Canon' this and that. But it is only now and then that

'Canon A. and B.', whom we stumble upon daily, hold any such historic post as those held by a Pusey, a Milman, or a Sydney Smith. Such a canon is far more likely to be a brand new creation of the nineteenth century, an honorary canon of Manchester or Liverpool. Nay, minor canons and priests, vicars, if they do not call themselves 'Canon B.', are sometimes well pleased if anybody else will call them so. The disease has even spread to an ancient and highly honourable class, the prebendaries or non-residentary canons of the old foundations. They cannot be left behind all the rest, and they, too, figure sometimes as 'Canon A.', sometimes as 'Prebendary B.' Some of them, perhaps deserve the nickname. I have heard an old-foundation prebendary speak of himself on a public platform as an 'honorary canon.' The climax of all is when not a simple canon, but a dignitary of some ancient Church, say a precentor of Lincoln or a chancellor of Lichfield, stoops to be spoken of in the ruck, like the last honorary canon from Newcastle. * * A layman who has no ambition to proclaim at every moment of his life either that he holds some local office, or that some honorary compliment has been paid to him, finds it hard to enter into the fancy for being called 'canon,' especially when the man so called is not a full and real canon, but only some kind of a canon with a difference. But it is clear that the title is very dear to the clerical mind, dear, above all, to the minds of honorary canons. I heard one of their clerical brethren the other day—not, to be sure, a canon himself—speak somewhat scornfully of some who 'love to be called of men, Canon, canon.'"

LORD COLERIDGE'S VISIT.

The visit of the Lord Chief Justice of England to this continent has been the occasion of considerable comment, pertinent and otherwise. His Lordship accepted an invitation from the New York State Bar Association, and, wisely or unwisely, left himself in the hands of his hosts as to the disposition to be made of him during the time fixed for his stay. Our own impression is that this was rather unadvisedly done, for his Lordship might have reflected that busy professional men cannot afford to devote six weeks of valuable time to the enter-

tainment of a guest, even so distinguished as Lord Coleridge, and that idle or unemployed professional men are not the safest escort for a Chief Justice. Lord Coleridge, however, without any fear of wearing out his welcome, left himself at the disposition of his hosts for a six weeks' visit. The latter, *avec grande connaissance de cause*, proceeded to map out a programme which, some weeks before his Lordship touched these shores, we ventured to characterize as rather extensive (p. 249). The programme embraced a visit to all the principal cities in Canada. But it is well known now that the Chief Justice has not crossed, and is not likely to cross the border. While he has devoted days to places like Portland and Albany, and while he endures philosophically long journeys like that from Boston to Chicago, the old historic cities of Quebec and Montreal remain unvisited, in spite of the announcement which mapped out a Canadian tour for his Lordship. It is not for Canadians to complain of this. The visit, as we have said, was to New York hosts, and his Lordship might very properly choose his own time and opportunity for visiting the great and growing Dominion which is now attracting so large a share of the world's attention. But at all events the people of Canada cannot accuse themselves of being over-forward in pressing their courtesies upon his Lordship. If the invitation was given it was in consequence of a very plain suggestion. We take the letter sent to Toronto by Mr. E. F. Shepard, chairman of the committee of arrangements, as a proof. He writes:

"We consider it our pleasing duty to acquaint you with these facts in order that you might have the opportunity of extending to Lord Coleridge any civilities which you may desire.

"We understand that there will accompany him to this country his son, as his secretary, and Sir James Hannen and Charles Russell, Esq., M.P. for Dundalk, Ireland, but whether they will be with his Lordship in Canada we cannot now say, and it is probable that but one or two of our committee will accompany his Lordship in Canada.

"As he has left in our hands the arrangement of his appointments and acceptances we should be very much obliged if you should tender him any courtesies by having such invitations sent to us for his Lordship and party. We are very much gratified at the interest which his visit is exciting, and hope that it may be the occasion for expressing and increasing the good-will which has so long and happily obtained between the two great English-speaking nations of the earth."

Where the fault lies for the fact that after Toronto and other Canadian cities had taken some pains to prepare for his Lordship, an excuse was sent for non-attendance, we do not pretend to say. We attach no importance to current reports, to the effect that Canadian invitations were ignored because Canadian railways refused to "dead head" his Lordship's party. We cannot believe that his Lordship's entertainers would place themselves or their guest in such a false position, for English gentlemen who may be invited from London to the country or elsewhere, whether it be in England, Ireland, or Scotland, do not expect a free pass on the railways from any one. We hope that Canada may yet have the honor of a visit from the Chief Justice on a fitting occasion in the near future. In the meantime we can only admire the enthusiasm which our American cousins have developed in his reception,—even the serious professional journals feeling the breath of excitement, the *Albany Law Journal* printing the names of those who sat down at a private dinner with his Lordship, while the *Chicago Legal News* rivals village newspapers by reproducing the entire bill of fare.

THE LANGUAGE OF THE CODE.

To the Editor of the LEGAL NEWS:

Having been occupied at College with the study of English, my attention has been naturally attracted, since engaging in law, to peculiarities in the composition of legal works; and considering that the professional jurist does not pretend or need to be a litterateur, and considering furthermore the bareness and unmistakableness which is generally the quality in their expressions to which every other quality must, if necessary, be sacrificed, the correct style of leading authorities strikes me as evidence of a high artistic level in the profession. Our Code, however, especially the English version, is not all of this level, nor does some of it fulfil very perfectly even the requisites of bare legal style. For example, a conspicuous fault is the use of several different terms to express one thing—a want of homogeneity of expression throughout—as in the phrases:—

1. "labor, trade, or business" (1891),
- "mercantile, mechanical or manufacturing business" (1871),

"trade, manufacture, or other business of a commercial nature" (1863),

"trading, manufacturing or mechanical purposes" (1834).

And compare 387: "financial, commercial and manufacturing companies."

2. "deemed" (1), *censés*,

"deemed" (2), *réputés*,

"held" (774), *réputés*,

"considered" (380), *censés*,
reputed.

3. "are construed" (8), *s'interprètent et s'apprécient*,

"interpreted" (12), *interprétés*.

4. "General partnerships" (1864-5), *Sociétés en nom collectif*.

In 1870 the introduction of "general" in its vernacular signification causes *sociétés en n. c.*, afterwards to be rendered "partnerships under a collective name."

5. "Law costs and the expenses incurred, etc. (2009).

"Law costs and all expenses incurred, etc. (1994).

6. "held" (2035), *possédés*.

"possessed" (2036), *possédait*.

7. "... Such other clauses and announcements as the parties may agree upon" (2492).

"... Such other announcements and conditions as the parties may lawfully agree upon" (2569 & 2587), a better form.

8. "arrangement" (2610), *stipulation*.

"stipulations" (785), *stipulations*.

Another fault in the Code is ambiguity:—

1. "Gifts by contract of marriage are subject to this revocation, and so are remuneratory or onerous gifts," etc., (813).

2. "The obligation to return the gifts and legacies made during the marriage, either to the consort who is entitled to succeed, or to the other consort alone," etc., (717).

3. "The ship's warlike stores and provisions," (2555). See fr. "*Les munitions de guerre, les provisions du bâtiment* . . ."

Prolivity likewise occurs:—

1. The words "general and special" before "partners" are useless in 1875, §3.

2. "For nine years or for a shorter term" are useless in 1300, cf. 1299.

3. So are "by their ascendants or other relations, or by strangers" in 829.

4. The lengthy terminal clause of 1275 could be replaced by "unless the contract otherwise stipulates."

The French idiom has led our own version into some defective phrases:—

1. "Moveable effects" (398) in place of "moveable property," or "moveable things," the phrases defined in 397.

2. "Owing to the favor of marriage," (820). Compare "the favor given to contracts of marriage" in 772.

3. "Married women" for the briefer and more characteristic "wives."

4. "... The moveable property and the enjoyment of the immoveables possessed by the partners at the date of the contract are also included; but the immoveables themselves are not included," where "but not the immoveables themselves," would be better.

5. The prolixity "general and special" in 1875, §3.

6. The awkwardness of using "general" in 1870.

The sound might often be improved by such changes as:—

1. Altering "if at the time at which they are made they do not confer an indirect advantage (721) to "if they confer no indirect advantage at the time of making;"

2. Finding some other word for one of the "accordings" in 733;

3. Writing "natural death" for death," 1892, §5, taken in conjunction with §6.

The objectionable consequences of not using one uniform phrase throughout for the same thing, appear in places:—

1. "of sound mind," is omitted among the requisites of the witnesses to authentic wills in 844, while contained in 1208.

2. "Extraordinary expenses incurred," 2552, is "extraordinary expenses necessarily incurred" in 2527.

A few of the above defects, it is true, concern only one's literary satisfaction in reading the Code, but the others have a great deal to do with its sense. I enumerate the less with the more important, because, belonging to one aspect, they ought to be reformed together, which I hope some day will be done. L.

NOTES OF CASES.

COURT OF REVIEW.

Montreal, September 29, 1883.

Before TORRANCE, RAINVILLE and JETTÉ, JJ.

WALTERS v. MAHAN et al.

Negotiable instrument—Pleading—Proof incumbent on holder.

It is not incumbent on the person producing a bill or note to prove consideration, if the instrument contains the words "value received," unless fraud be alleged and proved by the defendant.

TORRANCE, J. This was an action on a promissory note against maker and indorser for value received. The plea denied the receipt of value, and alleged forgery of the signature of the maker. The plea was maintained. I find that the signature of the maker Forget, was made by a cross and duly witnessed by the witness Bonin. There is no proof of value by the holder, and if fraud had been alleged and proved by Forget, it would have been incumbent upon the plaintiff to prove consideration, on the authority of Lord Campbell in *Fitch v. Jones*, 5 B. & Ellis, 245. Failing such allegation and proof, plaintiff is entitled to recover.

As the case is put before us, the plaintiff is presumed to have given value;—C. C. 2285, and being in good faith, and an innocent holder, Forget should suffer and not he.

JETTÉ, J., dissented.

Judgment reversed.

Macmaster, Hutchinson & Weir for plaintiff.
Mercier, Beausoleil & Martineau for Forget.

COURT OF REVIEW.

MONTREAL, September 29, 1883.

Before TORRANCE, RAINVILLE, MATHIEU, JJ.

TRUDEL v. STRONG.

Procedure—Requête Civile.

Where the Court had granted leave to defendant, after foreclosure, to file a plea, but the plea was not produced, and the plaintiff made his proof ex parte and obtained judgment, held, that the

requête civile subsequently presented by defendant was properly dismissed, notwithstanding the affidavit of his counsel alleging that there was an agreement between him and the plaintiff's attorney that the case should not be proceeded with.

TORRANCE, J. This was the merits of a judgment rendered in the District of Terrebonne on the 23rd June last, dismissing a *requête civile* presented by the defendant. The *requête* alleged that the judgment in favor of plaintiff, rendered on the 24th March, had been obtained by fraud and surprise. The procedure preceding the judgment was as follows:—The action was returned on the 20th January. On the 21st February the defendant was foreclosed from pleading. On the 24th February the plaintiff inscribed for proof *ex parte* on the 29th March. On the 20th March, the defendant made a motion to be allowed to file the plea herein. It was granted on payment of certain costs. The plea was not produced. On the following day, the 21st, the plaintiff made his proof in the absence of the defendant, and then inscribed for hearing on the 24th March, serving the inscription at the office of the prothonotary in the absence of any other domicile of the defendant at Ste. Scholastique. There is no evidence in support of the *requête* excepting the procedure and the affidavit of the attorney of the defendant. He swears that there was an agreement between him and the attorney of the plaintiff that the case should not be proceeded with, and the petition further says that after the judgment allowing the plea to be filed, the plaintiff could not proceed without putting the defendant *en demeure* to produce his plea. There is no evidence of the *entente* between the attorneys apart from the affidavit, and the plea had not been produced as implied by the motion. The Court below dismissed the petition as without proof, it had the parties before it from day to day, it allowed defendant to produce his plea instantaneously without delaying plaintiff. He did not avail himself of the permission. Plaintiff proceeded, and the Court here confirms the judgment.

Judgment confirmed.

Pagnuelo & St. Jean for petitioner.
Prevost & Turgeon for plaintiff.

SUPERIOR COURT.

MONTREAL, September 29, 1883.

Before RAINVILLE, J.

Ex parte HOGAN, and THE RECORDER OF MONTREAL.

Prohibition—Recorder—Quebec License Law.

The Superior Court will not interfere by writ of prohibition to prevent the Recorder of Montreal from hearing and deciding upon a complaint against petitioner in a matter within the jurisdiction of the Recorder.

In a proceeding against the petitioner before the Recorder, under the Quebec License Law, the revocation of petitioner's license as hotel-keeper was asked for. Held, that even if the license law did not sustain the demand for revocation of license, the Recorder nevertheless had jurisdiction to try the case, and the defendant's remedy was by certiorari.

The petitioner alleged in support of his petition for a writ of prohibition:—"That the City of Montreal, in its capacity of a body corporate, has caused to be issued out of the Recorder's Court of the City of Montreal a summons addressed to your petitioner and against him, whereby the City of Montreal complains that your Petitioner on Sunday, 12th August last past, did neglect to keep closed the bar of a certain inn then kept by him on the line of St. James street in the said city, Sunday being a time when the sale of intoxicating liquors is prohibited, contrary to the provisions of the Quebec License law of 1878, in such case made and provided, whereby and by force of the said law the said Petitioner had (as the said complaint alleges) become liable to pay a fine of not less than \$30 nor more than \$75, and the said complainant then and there and thereby prayed for judgment in the premises, and that the said Petitioner be condemned to pay a fine of not less than \$30 nor more than \$75 for the said offence, and further that the certificate by virtue of which the said Henry Hogan, your petitioner, obtained his license be revoked, &c.

"That the said Court in issuing the said writ of summons, exceeded its jurisdiction, for the following amongst other reasons:

1st. Because the Legislature of the Province of Quebec had no power or authority to pass the said Act intituled the Quebec License law of 1878, and the same is by its provisions and

more especially in respect of the provisions respecting the days whereon the trade and commerce in intoxicating liquors may lawfully be carried on, is *ultra vires* and unconstitutional;

2. Because the City of Montreal had no authority to institute the said prosecution and to pray or ask the said Court to cancel the certificate of your Petitioner in the premises, nor has the said Court jurisdiction to cancel the same;

3. Because the provisions of the Quebec License law of 1878 respecting the periods when bars shall be kept closed (Sect. 92) has been repealed as your petitioner is advised;

4. Because your petitioner has already been convicted, to wit, on the 6th day of August last past for the same offence as that complained of in the said summons, to wit, of having his bar, in the said house on said street, open at a time when the sale of intoxicating liquors was prohibited, although said offence so complained of was on a date anterior to the said 12th of August, and that if the said Court were to punish your petitioner for the offence charged in the summons issued against him as hereinbefore firstly set forth, your petitioner would be condemned more than once for the same offence;

5. Because the Act of the Legislature of this Province, 45 Victoria, chapter 9, is unconstitutional and *ultra vires* of the said legislature in so far as it affects the trade and commerce in intoxicating liquors, by declaring days whereon the one may not be sold, and forbidding owners or lessees or occupants of houses from free use of their said houses or of certain rooms in them, and further in declaring the not keeping of the bar in taverns and restaurants closed during certain hours and periods therein indicated, an "offence."

"That the said Recorder's Court in issuing the said summons and in causing the same to be served upon your petitioner, and in allowing the same to be returned into it, and in all the proceedings held and taken respecting the same, has acted in excess of its jurisdiction;

"That your petitioner has filed a plea to the said summons, alleging the unconstitutionality of the aforesaid several acts in so far as the complaint against him is concerned, and the various excesses of jurisdiction had and committed by the said Recorder's Court;

"That your petitioner is credibly informed that the Recorder of the City of Montreal, before

the said summons issued, positively declared his intention to cancel the certificate of any person or persons holding such, and found guilty of any contravention of the provisions of the Quebec License law of 1878 ;

"That your petitioner feels that for the reasons aforesaid, justice will not be done him before the said Court, inasmuch as the said Recorder has in effect by his said declaration prejudged the question of constitutionality of the said several statutes, without your petitioner having been afforded an opportunity of being heard ;

"That without the benefit of a writ of prohibition addressed to the said Recorder's Court of the City of Montreal, ordering the said Court not to proceed further with the hearing of the said case, and further ordering the said writ of summons and complaint with all the proceedings had and taken thereon to be returned before the Superior Court for Lower Canada in the city and district of Montreal on such day as in the said writ shall be fixed, your petitioner will sustain damage, &c."

The judgment of the Court is in the following terms :—

"Après avoir entendu les parties par leurs avocats respectifs sur la requête pour bref de prohibition produite par le requérant le 18 de septembre courant, avoir examiné la procédure et délibéré ;

"Attendu que le requérant allègue qu'il a été poursuivi devant la Cour du Recorder pour la cité de Montréal, pour avoir vendu de la liqueur enivrante un dimanche, le 12 août dernier ;

"Attendu qu'il allègue que la dite cité de Montréal conclut à ce qu'il soit condamné à l'amende, et que le certificat en vertu duquel il a obtenu sa licence soit révoqué ;

"Attendu que le dit requérant soumet que la dite Cour du Recorder n'a pas juridiction pour adjuger sur la dite plainte, et demande l'émanation d'un bref de prohibition enjoignant au Recorder de suspendre ses procédés sur la dite plainte ;

"Attendu que le requérant a soumis, comme proposition légale, que la dite Cour du Recorder n'a pas juridiction pour casser le certificat de licence du requérant ;

"Considérant que par l'acte des licences de 1878, section 92, la prohibition de vendre le dimanche ne s'applique qu'aux tavernes, au-

berges, restaurants de tavernes dans les mines d'or ;

"Considérant que par la section 102 du dit acte, toute condamnation pour contravention à la dite loi peut entraîner la révocation du certificat en vertu duquel la licence a été obtenue ;

"Considérant que par l'acte 42-43 Victoria, chapitre 4, il est défendu à toute personne de vendre de la liqueur enivrante le dimanche ;

"Considérant que par le statut 45 Victoria, chap. 9, la section 92 de l'acte de 1878 est abrogée, et qu'une autre loi lui est substituée, par laquelle il est défendu de vendre de la boisson le dimanche dans aucune auberge ou restaurant dans quelqu'endroit que ce soit dans cette province ;

"Considérant que la seule question légale à décider est de savoir si la pénalité édictée par la dite section 102 de l'acte de 1878, qui donne pouvoir de révoquer le certificat de licence pour contravention à la dite loi, s'applique à la contravention à une disposition faite par un statut subséquent ;

"Considérant qu'en supposant que les dispositions de la dite section 102 ne s'appliqueraient pas à la contravention dont se plaint la cité de Montréal, la dite Cour du Recorder n'en aurait pas moins juridiction pour entendre et décider de la plainte en question ; que le fait que la dite cité de Montréal demanderait trop en demandant la révocation du certificat de licence du requérant n'empêche pas la dite Cour du Recorder d'avoir juridiction, et que, dans le cas où la dite Cour du Recorder révoquerait le dit certificat contrairement à la loi, il resterait au requérant à se pourvoir par bref de certiorari ;

"Renvoie, en conséquence, la dite requête pour bref de prohibition avec dépens."

Church, Chapleau, Hall & Atwater for petitioner.

R. Roy, Q. C., for respondent.

ENGLISH HIGH COURT OF JUSTICE, PROBATE DIVISION.

January 30, 1883.

STURTON v. WHELLOCK.

Erasures in Will after execution by Testator.

Where erasures in a will are found after the death of a testator, the court can hear evidence to show under what circumstances they were made, and on proof of their having been made after the execution of the will, may order the original words to be restored.

The plaintiff as sole acting executor propounded the last will, dated the 8th of May, 1874, of John Payne, late of Sleaford, in the county of Lincoln, who died on the 13th of April, 1882.

On the 18th of July, 1882, an application had been made to the court on motion, on behalf of the plaintiff, for probate, this having been refused in the registry in common form, owing to certain erasures in the will, which were not initialed, or in any way authenticated by the testator. Over these erasures the word "five" had been written in every instance which occurred in the gifts or limitations in favor of the testator's grandchildren, and referred to the age at which their shares in certain trust legacies and the residue of his estate should become payable, the word "five" so appearing on the erasures being immediately preceded by the word twenty, which did not appear on any erasure. The word "five" so written on the erasures, filled the place of a word scratched out and rendered wholly illegible.

When the motion for probate had come before the judge, he had held that the question of the erasures could not be disposed of by him in a summary way without the consent of all parties interested, and that failing such consent the will must be propounded. It having proved impracticable to obtain that consent, this action had been commenced on 22d of July, 1882. The statement of claim which alleged the due execution of the will was delivered on the 9th of August, and no statement of defence had been filed by any of the defendants, but all parties interested under the will in the erasures had been cited and had entered an appearance. They were all willing that probate should be granted in the form prayed for by the plaintiff.

It was proved in evidence, that when giving instructions for his will the testator had expressed his wish to be that the requests to his grandchildren should not take effect until the latter were twenty-five years of age; that the solicitor, who had prepared the will for him, had explained to him that such bequests would be void as being made to come into operation more than twenty-one years beyond the lives of persons living at the time of the execution of the will, and that the testator had thereupon directed the insertion of the words twenty-one in all such cases. It was further proved in evidence that the will was drafted and engrossed,

had had the words twenty-one inserted wherever the word five had been substituted for one in the instrument as found on the death of the testator, and one of the attesting witnesses swore, that to the best of his belief, no erasure had been made in the will previously to the date of its execution.

Inderwick, Q. C. (with him *Bayford*), for plaintiff, asked the court to presume that the erasures had been made and the word "five" inserted after the execution of the will, and to direct that probate should be granted with the word "one" inserted instead of "five" wherever the erasures had been made. The best information as to the document before its execution was that the words "twenty-one" had been written in it. The presumption would be that the testator had made the erasures after executing it, even if the evidence did not warrant such presumption. *In the Goods of McCabe*, L. Rep. 3 P. & D. 94.

Dundas Gardiner and *J. W. Evans*, for defendants and parties cited, contended that the word "twenty" only should stand.

The PRESIDENT (Sir James Hannen):—I have no doubt from the evidence that what was originally written was "twenty-one;" that is, that when the will left the solicitor's office it contained those words. The question is whether the ordinary presumption arises that the erasures were made afterward? I arrive at the conclusion that I ought to act on the presumption that the testator made the alteration after the will had been executed. If the word "five" only were struck out, leaving the "twenty," I might do that which in the cases of some of the bequests the deceased had never intended. In this case I need not merely strike out the erasures. The case of *In the Goods of McCabe*, *ubi sup.*, is, in my opinion, applicable. If the testator made the alterations after he had executed his will, he must have done so under the impression that he had the power, for if he had known that he had not, he would not have done it. The extrinsic evidence satisfies me that the original words were "twenty-one," and I therefore allow the word "one" to be restored, and grant probate of the will in that form. — 48 L. T. Rep. (N.S.) 237.

RECENT ENGLISH DECISIONS.

Slander by remarks of member at club meeting—Remote damage.—A statement of claim alleged that plaintiff had been a candidate for membership of a club, and had been rejected on ballot, that defendant was a member of the club: that after the ballot a meeting of the club was called to consider a proposed alteration of the rules regulating election of members; that with a view to retain the existing regulations and secure plaintiff's exclusion, defendant falsely and maliciously spoke and published of plaintiff certain words (the words set out were defamatory, but not actionable *per se*); that "by reason of the said defamatory publications, the defendant induced or contributed to inducing a majority of the members of the club to retain the regulations under which the plaintiff had been rejected, and thereby prevented the plaintiff from again seeking to be elected to the club; the plaintiff thus lost the advantage which he would have derived from again becoming a candidate with the chance of being elected." *Held* (reversing the judgment of Field, J.), that there was no sufficient allegation of special damage, resulting from the speaking of the words complained of, to constitute a cause of action, and that the damage which was alleged was too remote, and defendant was entitled to judgment on demurrer to the statement of claim. Court of Appeal, March 19, 1883. *Chamberlain v. Boyd*. Opinion by Lord Coleridge, C. J., and Brett and Bowen, L. JJ. (48 L. T. Rep. [N. S.] 328).

Limitation—New promise.—In an action claiming an account against the defendant, where the defendant had pleaded the Statute of Limitations, the plaintiff put in evidence a letter to him from the defendant, written within six years before action brought, containing the following passage referring to the debt in question: "I thank you for your very kind intention to give up the rent of Tyn-y-Curwydd next Christmas; but I am happy to say at that time both principal and interest will have been paid in full." *Held*, a sufficient acknowledgment from which to imply an unconditional promise to pay. Chan. Div., April 9, 1883. *Green v. Humphreys*. Opinion by Pollock, B. (48 L. T. Rep. [N. S.] 479).

RECENT UNITED STATES DECISIONS.

Promissory Note—Consideration—Criminal conversation.—It is a good defence to a suit on a note given in settlement of damages claimed for criminal intimacy with the wife of the payee, that as a part of the settlement the parties agreed in writing that the note should be void if the payee should ever speak of such intimacy, and that he had broken his agreement. The court said: "There is no rule of public policy which forbids such a contract for silence so long as it is not in contemplation to conceal and prevent the punishment of a crime. It does not appear, and will not be presumed, that in this instance a crime had been committed; nor but that, if there had, its punishment had been barred by lapse of time before the agreement was made. The public morals will surely not suffer by the suppressing of such scandals, and if the individuals concerned see fit to put their settlements and contracts on such a basis they may do so, and must be held to the legal consequences." — *Wells v. Sutton*, 85 Ind. 70.

GENERAL NOTES.

A curious forgery has occasioned much excitement among antiquarians and Hebrew scholars. One Shapira, a dealer in antiquarian treasures, produced an apparently ancient manuscript purporting to contain a portion of the Pentateuch, with variations from the accepted version. The forgery was cleverly executed, and puzzled a good many people who were not incapable judges. Mr. Clermont-Ganneau, however, has pronounced the manuscript to be a forgery, and suggests that the forger used for his purpose a part of the skin out from the margin of what are known as synagogue rolls. Mr. Shapira is said to keep a large curiosity shop in Jerusalem, and his refusal to permit a close examination of the thread, etc., by the expert was somewhat suspicious.

Some interesting statistics have been collected by Professor Woolsey on the marriage and divorce question in Europe. In Protestant countries divorces are much more frequent than in those where the Catholic religion prevails, and this is undoubtedly due to the influence of the Catholic Church, which forbids divorced people to remarry. In the infrequency of divorce the Scandinavians rank first, the Scotch and English coming next, and the Germans last among the Protestant races of Europe. In Norway there is only one divorce to 1,852 marriages. In Scotland the ratio stands one divorce to 470 marriages, and in England one to 745. It is scarcely necessary to remark that the United States is far ahead of the heaviest record, the proportion even in Puritan New England being one divorce to every eleven marriages.

The Legal News.

VOL. VI. OCTOBER 13, 1883. No. 41.

ENGLISH AND FRENCH LAWYERS.

In a letter to the *Albany Law Journal*, Mr. E. E. Moise, of New Orleans, remarks as follows upon the points of difference between English and French systems and their influence upon those who work under them:—

"In this State (Louisiana) with a Code almost an exact translation from the Code Civil or Napoleon—where the attorney is obliged to read the French commentators; with the law merchant governing—with no jury, unless specially prayed for in our State court, and then they, judges of the application of the law to the facts, the judge not being allowed to trench on the facts, with the common-law system of juries in the United States Court, some of my meagre observations on French and English legal mind may not be unwelcome. The difference between the English and French jurists and lawyers can be simplified by saying the former is concrete the latter abstract. It is hardly necessary to track the cause of this. The student of common law knows that there is no common law except as applied. The law is the law of a given case—of certain facts. This, that, or another *fact* allows the plaintiff to recover. This is technically known as *case law*—that is the law of an actual state of circumstances. There is the rule of *stare decisis* at common law. There is no such rule among the French, because the Code has accomplished what the desperation of common-law judges drove them to endeavor to accomplish by the rule of *stare decisis*. Codification was simply a means to an end. *Stare decisis* failed to accomplish it. Certainty in the law, fixed rules of conduct of right. Certainty in the meaning that as little is to be left to the judge's notion of right and wrong as possible. The peculiar system of practice in the French courts aided by the Code (generally a series of abstract principles) made the logic of the French lawyer a keen and heartless logic. It was and still is a logic of mind, a logic without feeling, that took no account of human passion and eradicated the governing principle

of the logic of the English lawyer—common sense.

"Law to the French lawyer was and is a proposition from which logically deduced conclusions should be the judge's decree. Law to the English lawyer (when not statute law) was and still is an attempt to put rules for human conduct into words—a rule, but not a rule pure and simple, but a rule to be applied to human actions. The English lawyer looks back because precedent is the closest he can get to a Code. If the English lawyer had a Code he would *not* look back. I desire to illustrate this with Louisiana and Louisiana jurisprudence. No one who is at all familiar with the jurisprudence of this State will say that the Louisiana judge or lawyer is a precedent-loving individual. No case lawyer can expect to succeed in this State. No lawyer who knows the law is this or that solely because it has been so held in such a case need have any hope of obtaining any prominence at the bar. And since the Englishman's concrete mind (practical) has assumed its prominence at the bar and on the bench—since law has come to be understood as intended to be applied to human affairs—you will not be surprised to know that the metaphysical and keen logic of the French jurist has lost ground considerably. Judge Spofford, in *Johnson v. Bloodworth*, 12 La. Ann. 701, in speaking of the French jurists, said: 'When jurists of a race so much addicted to *theoretical speculation*, and so little addicted to reverence for each others' opinions draw a conclusion from the Code, in which they unanimously concur, we may *perhaps* set it down as an obvious truth.'

"This is not an exaggerated statement, nor is it an imaginative description. It is a common thing for a lawyer with a bad case to go to the French authorities. It is a well-known and recognized fact among the older members of the bar that the young lawyer just admitted makes very pretty and very ingenious points: he is very keen, but like those authors from whom he is fresh, his arguments lack the element of common sense. He overcomes this in time.

"In *Oxane v. Delile*, 5 N.S. 28-29, the Supreme Court declined to follow the French jurists, though the article of the French Code (Code Civil or Napoleon) was similar to ours. Why—for a practical reason; because the tex-

tual provisions of our statutes must be interpreted by our former jurisprudence. And for a practical reason they declined to follow the French in *Jung v. Doriocurt*, 4 La. 175. In *McDonough v. Gravier's Curator*, 9 id. 546, such a jurist as Toullier did not affect the court except to admire his logic.

"The Englishman in Louisiana does not look back, but he has still the enviable mental quality of understanding that laws were made for men, and the logic of law is bad logic if it lack the element of common sense. Benjamin's great success here as well as in England was due partly, as the *London Times* has truthfully said, to the legal education he acquired at the Louisiana bar, but mostly to his 'common sense logic.' The Louisiana student of law does not dare to risk his future upon any thing but a mastery of principle. His Code and his jurisprudence forbid it. His Code coming from Roman, Spanish, and French law, with some important common-law principles grafted on it. His jurisprudence, the magnificent result of grafting French system on the Anglo-Saxon practical temperament. The Louisiana lawyer if he hope for success must know common law, and common-law practice, including chancery and admiralty, Spanish law, Roman law, French law, because his own system comes from these four, and the necessities of his practice in the United States courts require his familiarity with admiralty, chancery and common-law practice. Louisiana presents an excellent field to the philosophical student. I have given the hints; I trust some abler pen will one day see the harvest here and gather it."

JURIES AND VERDICTS.

Several incidents of recent jury trials drop in this week from different quarters. In British Columbia the Chief Justice has had to do with a jury that would not convict. The evidence against a prisoner tried in Victoria was as strong, it is said, as evidence could well be, but the jury acquitted. Chief Justice Begbie told them their verdict was disgraceful, and added: "Many repetitions of such conduct as yours will make trial by jury a horrible farce, and the city of Victoria which you inhabit a nest of immorality and crime. Go, I have

nothing more to say to you." Turning to the prisoner the Chief Justice said:—"You are discharged; go and sandbag some of those jurymen. They deserve it!"

In *State v. Cartwright*, 20 W. Va. 32, a conviction of felony was set aside, because one of the principal witnesses for the prosecution, who was an active participant in the fight which caused the indictment, was permitted to come into the juryroom, after their retirement, and play the fiddle for them for half an hour; although there was no conversation between the fiddler and the jury, and the jury all swore that the fiddling had no influence on their verdict.

In another case in the same State, *State v. Robinson*, 20 W. Va. 715, the jury were permitted to read newspaper accounts of the Guiteau trial, then in progress. The newspapers contained the evidence of Dr. Gray, examined as an expert on the subject of insanity, in which he ridiculed the idea that such a thing as "moral insanity" existed, and called "dysomania" drunkenness. The jury into whose hands these newspapers fell were engaged in trying a case of murder, in which the defence was insanity, super-induced by long-continued habits of intoxication. The court adopted the view that the newspaper reports were calculated to prejudice the prisoner, and a new trial was granted.

In a case before the Supreme Court of New Mexico Territory, *Territory v. Kelly*, 2 New Mex. T. 292, the prisoner remained shackled while some of the jurors were being called and examined. The Supreme Court held that if the irons had remained on the prisoner during his trial, or for any considerable portion thereof, the Court would be compelled to reverse the judgment; but as it appeared from the record that they so remained for an inconsiderable time while a few only of the jurors were being called and examined, and before any of them had been accepted and sworn, the prisoner's rights of defence were not prejudicially affected thereby to an extent that would justify a reversal of the judgment on that ground.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

DORION, C. J., RAMSAY, TESSIER, CROSS and BABY, JJ.

MONTREAL, September 24, 1883.

THE CANADA GUARANTEE Co. (deft. in the Court below) Appellant, and McNICOLL, es qual. (plff. below), Respondent.

Surety, Liability of—Insolvent Act—Official Assignee appointed Assignee by Creditors—Default.

Where an official assignee has taken possession of an insolvent estate in that capacity, and subsequently the creditors have appointed him assignee to the estate, and while acting as assignee of the creditors he makes default to account for moneys of the estate, the creditors have recourse against the surety who guaranteed the due performance of his duties as official assignee.

The appeal was from a judgment of the Superior Court, condemning the Company appellant as sureties on a bond given by Alphonse Doutre, formerly official assignee. The bond guaranteed the due performance of the duties of Doutre as official assignee. In 1878 one George L. Perry was put into insolvency by a writ of compulsory litigation, and Doutre took possession of the estate as official assignee. Subsequently, at a meeting of the creditors duly called, Doutre was appointed assignee to the estate by the creditors. Doutre died in 1879, and the present respondent was appointed assignee in his place. It was ascertained that Doutre was indebted to the estate of Perry in the sum of \$364.42. The present action was instituted on the bond to recover that amount from the sureties. The Court below sustained the action. (See 4 Legal News, p. 78, for judgment of the Superior Court.)

J. C. Hutton, for the appellants, contended that by the terms of the contract, the sureties ceased to be liable when Doutre was appointed assignee by the creditors. The bond was given for the due performance of his duties as official assignee, and there was a formal admission of record that the default complained of occurred while Doutre was acting as creditors' assignee. It followed that no complaint was made of his conduct while acting as official assignee, and

the sureties on his bond as official assignee, therefore, could not be held liable. Under the Insolvent Act, official assignees were obliged to give security to Her Majesty, and the bond sued on was a bond of this nature. By section 29 of the Insolvent Act, the creditors might appoint an assignee who could be required to give security for the due performance of his duties to such an amount as might be fixed by the creditors at the meeting. Here the creditors had thought proper to appoint as assignee the same person who had possession of the estate previously as official assignee, but they had neglected to require him to give security, as provided by the Act; and they now attempted to get their recourse on the bond which applied solely to his acts as official assignee. This would be an extension of the obligation of the surety without his consent or acquiescence, which was entirely without any justification under our law. The Court below had followed the decision of Johnson, J., in *Delisle et al., v. Letourneau*, 3 Legal News, p. 207, but the learned judge, as far as his individual opinion was concerned, appeared to be in favor of the appellants' pretension. And since the rendering of the judgment appealed from, a third judge of the same Court (Mr. Justice Jetté), in *Dussereau v. Letourneau*, 5 Legal News, p. 339, had ruled expressly in favor of the appellants' pretension, and there had been no appeal from his honor's judgment. In Ontario there had been a decision by Chief Justice Hagarty, in a case of *Miller v. Canada Guarantee Company*, in which the point adjudged was precisely the same. Chief Justice Hagarty ruled that the suretiship continued only so long as the assignee is acting by virtue of his original appointment. This ruling had been acquiesced in, not having been moved against, and the opinion of the Chief Justice was evidently considered sound, for the question had not been raised in any subsequent case. The attention of the Court was also directed to a manifest error in the judgment, by which a sum of costs never paid by the plaintiff was included in the condemnation. In any case the judgment must be modified to this extent.

Laflamme, Q.C., for respondent, submitted that the bond was given for the benefit of the creditors of "any estate" which might come into the possession of the assignee under the

Insolvent Act. When an official assignee is continued in office by the vote of the creditors, the bond given for the performance of his duties as official assignee still applies. The law allows the creditors to exact additional security, implying that the security already given still applies. The practice had been, where an official assignee was appointed creditors' assignee, to rely upon the bond given by him as official assignee.

RAMSAY, J. (Diss.) The only question that arises on this appeal is whether the defalcation took place while the assignee was acting as official assignee or not.

It appears one Perry became insolvent, and his estate was placed in the hands of an official assignee. The creditors of the insolvent, at a regular meeting, appointed the assignee, assignee of the estate. After this the assignee died, leaving a balance due to the estate. By this action it is sought to recover from the Guarantee Company the amount of the deficiency on their bond as security for the assignee as official assignee. The Guarantee Company contend that they are not his securities, as he was not acting as official assignee.

This question has come up on several occasions, and has been differently viewed by the judges. The whole question must turn on the interpretation to be put on the words of statute.

The argument put forward amounts to this: The Act by section 28, having dealt with the official assignee and his security, proceeds by section 29 to provide for the appointment of an assignee who may or may not be an official assignee, and it is provided by that Act that he shall give security "in manner, form and effect as provided in the next preceding section." Therefore it is said he is not an official assignee, and the law has specially provided how the estate shall be protected against his wrong-doing.

On the other hand it is said that by section 28 it is expressly provided that the official assignee's security is for the benefit of Her Majesty and for the benefit of the creditors of any estate "which may come into his possession under this Act." The estate came into his possession under this Act, and it was under this Act he always held it.

Notwithstanding the strength of this second proposition, I think the force of argument is in

favor of the first proposition. When it says the bond of the official assignee shall be for the benefit of the creditors of any estate that comes into his possession under this Act, it naturally means, acting in the capacity then referred to. Now it is plain he did not act as official assignee after the appointment by the creditors. It was not in virtue of his official position he acted, but in virtue of his appointment. It was entirely the fault of the creditors if they did not exact security.

We have not to decide what would be the effect of a continuance of the official assignee by a failure on part of creditors to appoint. C. J. Hagarty has given a decision on that point, which at first view appears to me to be supported by the terms of the Act.

I am to reverse.

DORION, C.J., also dissented.

The majority of the Court were of opinion to hold the surety liable, and the judgment was therefore confirmed.

Hutton & Nicolls, for Appellant.

R. & L. Laflamme, for Respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, September 27, 1883.

DORION, C.J., MONK, RAMSAY, CROSS & BART, JJ.

QUEBEC STEAMSHIP COMPANY & MORGAN.

Jurisdiction—Cause of action—Action of damages for failure to perform contract.

Where the action is in damages for failure to perform a contract, the debtor may be sued at the place where the contract was made, though the failure to perform occurred in another district.

Wurtels v. Loughan et al. (1 Q. L. R. 61), and *Conroy & Ross*, (8 L. N. 154) commented on.

Motion by the defendant, the Quebec Steamship Company, for leave to appeal from a judgment dismissing a declinatory exception.

The action was for damages, by a traveller who had taken a return ticket at Montreal for himself and family to go and return from Metis. The plaintiff alleged that the defendant's steamer did not stop at Metis as was promised, that he had suffered by this.

The defendant pleaded by declinatory exception that its domicile was in the district of Quebec, and that as the whole cause of action

did not arise in the district of Montreal the action was wrongly brought there.

The Superior Court dismissed the declinatory exception.

Sir A. A. DORION, C. J., said this point had been decided by Chief Justice Meredith in the case of *Wurtels & Lenghan*.^{*} A very similar point had been raised in the case of *Conroy & Ross*,† but this Court, confirming the judgment of the Court below, had decided that the declinatory exception was unfounded. The case was this. A merchant in Ottawa had contracted with a merchant in Quebec (Ross) to sell timber for him in Quebec. Part of the timber was sold there, and the market being unfavorable Ross sent the rest of the timber to Liverpool, and it was sold there. The proceeds were not sufficient to pay expenses, and Ross sued Conroy in Quebec. We held that within the meaning of the code the whole cause of action had arisen in Quebec.

RAMSAY, J., said that the difference between the present case and the case of *Ross & Conroy* was that the latter case arose directly on the contract, whereas in the former the action was for damages. He thought, nevertheless, that where the action arose on a failure to perform a contract there was really no difference. This was the only point before the Court, and he did not think it necessary to enter into the old question of what was the "whole cause of action." The attempts to define had not been very successful.

Leave to appeal refused.

Lussu, for defendant moving.

Bulter, for the plaintiff.

COURT OF QUEEN'S BENCH.

MONTREAL, September 27, 1882.

DORION, C. J., MONK, RAMSAY, CROSS & BABY.

DORION, appellant, & DORION, respondent.

Security for costs—Notice.

It is necessary to give notice to the opposite party before putting in security for an appeal to the Queen's Bench from a judgment of the Superior Court.

DORION, C. J. A motion has been made in this case that the appeal be dismissed, the security bond having been entered into without

notice to the opposite party. It was also alleged that the sureties were insolvent. On the other side it is contended that no notice is necessary. The Court is of opinion that it was the duty of appellant to give notice. Notice was required when the Court ordered security to be given in a case. In appeals from the Circuit Court the law provided, for obvious reasons, that the security might be given without previous notice; the article providing for appeals from the Superior Court makes no mention of notice. It was therefore to be presumed that notice was required, that being the general rule. Appellant had suggested no excuse for his not following the ordinary and proper procedure, and therefore his appeal would be dismissed with costs. He was still in time to renew his appeal.

Motion granted, and appeal dismissed with costs.

Barnard, Q. C., for respondent.

Pagnuelo, Q. C., contra.

COURT OF QUEEN'S BENCH.

MONTREAL, September 26, 1883.

DORION, C. J., MONK, RAMSAY, TESSIER
and BABY, JJ.

CLEMENT & FRANCOIS.

Curator—Appeal from judgment—Execution.

The curator to a person interdicted cannot appeal from a judgment, until he is authorized by the judge, or the prothonotary, on the advice of a family council.

In such case the Court of Appeal will not grant leave to execute a judgment for aliments, notwithstanding the appeal.

This case came up on a motion to reject the appeal taken by a curator to an interdicted woman without the authorisation of a family council as required by Arts. 306 & 343 C. C.

DORION, C. J., said that the Court in a previous case had already allowed the tutor to file the authorisation obtained but not produced, and he thought that the appellant was also entitled to delay to obtain the authorisation. This was the rule in France, and it was reasonable. If the Court were to hold absolutely that the appeal could not be brought until the authorisation was obtained, the minor or interdicted person might readily be cut out of his rights where there was a short delay to institute the

^{*} 1 Q. L. R. 61.

[†] 6 L. N. 154.

appeal. The authorisation to a tutor or a curator stood on a totally different footing from the authorisation to the wife to sue. The appellant would have one month to produce an authorisation.

The respondent also moved for leave to execute the judgment, notwithstanding the appeal. The argument was that the judgment for alimments was executory notwithstanding the appeal. If so, it was unnecessary for this court to interfere, and if not, the Court did not think this was a case in which it was desirable to make any special order as to alimments, if the Court of Appeals has authority to do so, as to which the Court expresses no opinion.

Motion to reject appeal granted, and take nothing by motion for leave to execute judgment.

Pagnuelo, Q.C., for appellant.

Geoffrion, for respondent.*

COURT OF QUEEN'S BENCH.

MONTREAL, September 24, 1883.

DORION, C. J., MONK, RAMSAY, TESSIER and BABY, JJ.

MCCRACKEN et al. (plaintiffs below), Appellants, & LOGUS (defendant below), Respondent.

Procedure—Order of Judge appointing sequestrator—Appeal.

The Court of Queen's Bench sitting in appeal has jurisdiction to grant leave to appeal from an order of a judge in Chambers, where the judge is given the jurisdiction of the Court.

A judgment appointing a sequestrator is a final judgment, and may be appealed from de plano.

RAMSAY, J. This is an appeal from the decision of the Court of Review, setting aside an order of a Judge establishing a *séquestre*. (See L. N., 90.)

The first ground taken by appellants is that the Court of Review had no jurisdiction to set aside the order of the judge; 1st, because the order of a judge in Chambers is not appealable. 2nd, that even if appealable it is an interlocutory judgment which cannot be revised by the Court of Review, or by this Court *de plano*.

The first of these objections has presented itself in different forms before this Court within the last nine years, and I regret that I have not my notes by me at present, for I am

disposed to believe that a question analogous to the present one has been already decided by this court. In the absence of my notes I must trust to memory. I know we have decided that we had not jurisdiction to give leave to appeal from a ruling of a judge at *enquête*, but generally, I think, we have said that where the Judge was given the jurisdiction of the Court, that then we had jurisdiction to grant leave to appeal from his order or judgment, for then it was a judgment of the Court. If that proposition be conceded, then we have only to enquire what words will convey this jurisdiction. The words relied on here are to be found in article 876 C. C. P.:—"All demands for sequestration are made by petition to the Court (or to a Judge)." It is contended that if the Judge decides, it is not the decision of the Court, and that the party dissatisfied with the order must have it revised by the Court. Such a decision would be in effect to override the Statute, and to say, that the Court and the Judge had not concurrent jurisdiction. Plainly if they have concurrent jurisdiction the one cannot set aside the decision of the other. The Superior Court has already decided the point in a sense adverse to the appellant, and I think, unless there was a conflict of opinion among the Judges in the Superior Court, it would be very unwise of this Court to interfere with the practice of that Court unless it could be shown to be clearly unlawful. In the case of the *Heritable Securities and Mortgage Association & Racine*, the plaintiffs applied in Chambers for, and obtained, the order of a Judge for the appointment of a sequestrator. Some days after the defendant applied to another Judge in Chambers to set aside the order, which was granted. Plaintiffs then applied to another Judge in Chambers to annul the second order, and the Judge referred the parties to the Practice Court. There the question came before Mr. Justice Rainville, who after full argument decided that "the Court had no jurisdiction to revise the order of Mr. Justice Johnson," that is, the first order. In other words Mr. Justice Johnson's power acting in Chambers under article 976 C. C. P. was equal to that of the Court.

But it may be said that this is not conclusive, for that although equal to that of the Court, it is not that of the Court, and consequently that there is nothing to justify an appeal. It seems

* See 16 L. C. J., 224.

to me that this is hyper-critical, and that when a Statute gives equal or concurrent jurisdiction to the Court and to each of its Judges, it is to be presumed that the intention of the law is to make the judgment of the Judge that of the Court.

The second objection is that the judgment is interlocutory and not final, and consequently that the Court of Review had no jurisdiction, and that the Respondent's remedy was an application for leave to appeal to this Court.

The words final and interlocutory have given rise to considerable discussion here and elsewhere. They are relative terms to some extent. We have generally held, in all ordinary procedure, that "final," as regards appeal, means last in the case, but I think there is a great distinction to be made between ordinary and extraordinary procedure. In the latter there can be no remedy by the final judgment. The person subjected to it carries on his contest under a disadvantage which may be fatal. For instance, would it not be absurd, if a litigant's whole property were locked up by a sequestration, to say to him, this is not final, go on and contest as you can, the final, meaning last possible, judgment in the case will do you ample, if tardy justice. There is an appeal on a *Capias* and on an attachment, why should there be none on the appointment of a *sequestre*? Where there is the same reason for a thing there should be the same law. But it is said the Statutes allow the appeal in these cases. It seems to me that these are statutory recognitions that extraordinary proceedings, the injury of which cannot be rectified, should be appealable as final judgments.

Again, article 885 C. C. P. enacts that "orders of sequestration are executed provisionally, notwithstanding and without prejudice to any appeal." There is therefore no interest to be injured by the party sequestered pursuing his appeal. I therefore think that the judgment of the Judge in Chambers is that of the Superior Court and that it has that sort of finality which permits the party complaining of it to appeal *de plano*.

On the merits it seems to me that there is nothing to be said. The sequestration of the property of the possessor under title from the public lands department could scarcely be justified, until perhaps there was a judgment against the possessor, in favour of some one with a better title. I am to confirm.

DORION, C. J., dissented.

Judgment confirmed.

T. P. Foran for appellant.

E. Laflamme, Q. C., counsel.

L. N. Champagne, for respondent.

S. Pagnuelo, Q. C., counsel.

COURT OF QUEEN'S BENCH.

MONTREAL, September 19, 1883.

DORION, C. J., MONK, RAMSAY, CROSS and BABY, JJ.

MONTREAL TELEGRAPH CO. et al. (defts. below), Appellants, and LOW (plff. below), Respondent.

Corporation—Lease by Telegraph Company—Action by shareholder.

Held, reversing the judgment of Rainville, J., (5 Legal News, 12), that the Montreal Telegraph Company had authority to make the agreement in question with the Great North Western, and that the plaintiff had not established such interest as entitled him to maintain an action in his own name for the rescission of the contract.

The Court (Dorion, C. J., and Ramsay, J., dissenting) reversed the judgment of the Superior Court, Rainville, J., reported in 5 Legal News, p. 12, and maintained the lease.

The following is the judgment of the Court:

"Considering that the respondent has failed to show or prove any damage occasioned to himself personally, resulting from the matters by him complained of in this cause, and has likewise failed to show that he has such right or interest as entitles him to maintain an action, more especially in his own name and on his own behalf;

"And considering that it has been shown and established that the appellants had good right and sufficient authority to entitle them to make and carry out the agreement herein complained of by the respondent;

"And considering that there is error in the judgment herein rendered by the Superior Court at Montreal on the 31st day of December, 1881, doth reverse, annul and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth dismiss the action and complaint of the said respondent with costs, as well of this Court as of the said Superior Court (Hon. Sir A. A. Dorion, C.J., and Mr. Justice Ramsay dissenting).

Judgment reversed.

Abbott, Tait & Abbotts, for Montreal Telegraph Company.

Doutre, Joseph & Dandurand for the Great North Western Company.

MacIven & Leet for respondent.

S. Bethune, Q. C., counsel.

CIRCUIT COURT.

MONTREAL, October 1, 1883.

Before MATHIEU, J.

THE MONTREAL PRINTING CO. v. IVES.

Advertising contract—Circulation.

The plaintiff sued for a sum of \$50 alleged to be due for the insertion and circulation of the defendant's advertisement in their publication called the "Farmer's Almanac," in virtue of a contract in the following terms:—

"To the Publishers of the Farmer's Almanac:

"Please insert our advertisement, to occupy a space of one half page (op. April) top page half, for which we promise to pay fifty cents for each thousand circulated."

"(Signed), H. B. IVES & Co."

The plaintiffs claimed to have circulated 100,000 copies of the almanac, and to be entitled to \$50.

To this action the defendant pleaded that the almanacs had not been circulated under the terms of the contract; or according to the custom of trade; that all that the plaintiffs had done was to send the almanacs in quantities varying from 250 to 5000 to their customers throughout the Dominion; that defendant had always been ready, as appeared by his protest before the institution of the action, to pay for the *bond fide* circulation of his advertisement, but that plaintiffs had never furnished him with returns from their customers or with any reasonable proof of circulation.

At the trial the manager of the plaintiffs produced the receipts of their customers for quantities of the almanacs ranging from 250 to 5000, and (under defendant's objection as to the legality of this proof) stated that before the signing of the above contract he had explained to defendant the Company's method of doing business, which was to sell the almanac in quantities upon the orders of their customers, each bundle or set of almanacs having on the outside cover of each almanac the advertisement of the particular customer to whom the bundle was sold, thus offering him a direct inducement to circulate them. One of plain-

tiffs' customers deposed that he had received a quantity of 5000 almanacs, and that he had sent them in parcels to his customers for circulation.

The defendant examined two witnesses who gave their opinion that, according to the custom of trade, the distribution proved would not be considered a fulfilment of a contract for circulation, which (especially in the case of an ephemeral publication) meant distribution to individuals through the post or otherwise. The defendant also produced a letter from one of the plaintiffs' customers admitting that they still had on hand 250 of the almanacs (charged to defendant in the action) which they kept for agencies about to be opened.

MATHIEU, J., gave judgment for plaintiffs, on the ground that in his opinion they had in good faith done all that they contemplated doing by their contract.

Archibald & McCormick for plaintiffs.

Wotherpoon & Lafleur for defendant.

GENERAL NOTES.

Private seals have now been abolished in Ohio since March 29, 1883, but we do not remember of having seen a single instrument which required a seal in its execution before the statute that was without one since the passage of the act abolishing them. Every lawyer seems anxious for their abolition, but all seem to hesitate to drop them for fear some question may arise as to whether the particular instance was contemplated by the law.—*Cincinnati Law Bulletin*.

The London *Times* says:—"In consequence of the numerous applications which have been made to the Home office for an appointment to the place of public executioner, we are requested to state that it is neither the right nor the duty of the Secretary of State to make any such appointment. There is no such office as that of public executioner appointed by the Government. The person charged with the execution of capital sentences is the sheriff. It is the right and the duty of the sheriff to employ and to pay a fitting person to carry out the sentence of the law."

When the Lord Chief Justice of England arrived at Springfield on his way to St. Louis, he found the Hon. Milton Hay, one of the ablest lawyers in the State, at the depot, dressed in a new suit of the best broadcloth and a new silk hat, to welcome him to the Capital of the State, but the time allotted to Lord Coleridge would not permit him to remain over. There was a great contrast between this suit and the one worn by the distinguished lawyer when he was a candidate for colonel during the Black Hawk War.—*Chicago Legal News*.

The Legal News.

VOL. VI. OCTOBER 20, 1883. No. 42.

DIVORCE.

In the case of *Fisk & Stevens*, contained in the present issue, the Court of Queen's Bench was asked to decide one of the most important questions ever submitted to our Courts. Mr. and Mrs. Fisk (defendant and plaintiff) were married in New York, and their matrimonial domicile was in that State. Subsequently Mr. Fisk removed to Montreal, Canada, and established his domicile there. The wife, later on, was desirous of obtaining a divorce, and applied to the Supreme Court of New York, which, on proof of the husband's adultery, granted a decree dissolving the marriage. The husband appeared in the divorce suit, but did not contest it. After obtaining the divorce the woman, without any authorization whatever, sued her late husband at Montreal for an account of the fortune which she had placed in his hands at the time of the marriage. If the New York divorce was valid in the Province of Quebec this action would be maintainable in our Courts. If the divorce was not valid, then the wife before bringing suit, should be authorized by her husband or (on his refusal) by a judge. The question in the case, therefore, was whether the divorce obtained abroad could be recognized by our Courts. Mr. Justice Torrance in the Superior Court, held that the divorce was valid here, and this opinion is shared by Mr. Justice Monk and Mr. Justice Cross of the Court of Appeal. The majority of the latter Court (Dorion C. J., Ramsay and Baby, JJ) hold that the divorce cannot be recognised here; that the marriage tie in this Province is indissoluble, save by a special Act of Parliament in each case, and that the domicile of the husband being here, the wife had no right to go back to the matrimonial domicile to institute an action of divorce. As the effect of this decision upon the law of the case was to pronounce the parties still husband and wife, it followed that the suit by the wife in our Courts without authorization, was illegal, and the action was dismissed, the recourse of the wife to bring an action of account, on authorization properly granted, being reserved.

We give the opinion of Mr. Justice Ramsay in favor of this view, and the dissentient opinion of Mr. Justice Cross. The case is to be carried to the Supreme Court of Canada.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, September 19, 1883.

DORION, C. J., MONK, RAMSAY, CROSS & BABY, JJ.

FISK (def. below), Appellant, and STEVENS (plff. below), Respondent.

Divorce obtained by wife in foreign country while husband domiciled in Quebec—Right of wife to an account—Absence of authorization.

The parties were married in the State of New York, without antenuptial contract, and their matrimonial domicile was in that State, but the husband afterwards changed his domicile to the Province of Quebec. After this change of domicile the wife obtained a divorce in the Supreme Court of New York State, the husband appearing in the suit, and not contesting. Held (reversing the judgment of Torrance, J.,) that divorce not being recognized by the law of the Province of Quebec, which was the domicile of husband and wife, the decree obtained by the latter in New York had no binding effect in Quebec, and notwithstanding such decree the parties were still husband and wife; and therefore, the wife could not bring an action against her husband for an account without being authorized.

The appeal was from the judgment of the Superior Court, Torrance, J., reported in 5 Legal News, p. 79.

CROSS, J. (diss.) On the 29th August, 1881, Virginia Gertrude Stevens instituted an action in the Superior Court at Montreal against Henry Julius Fisk, in which she alleged that in May 1871, they, the plaintiff and defendant, were married in New York, their actual and intended domicile. They made no ante-nuptial contract. Their proprietary rights were consequently governed by the laws of the State of New York, which permitted her to retain the absolute and exclusive ownership, control and disposal of all property, effects and rights belonging to her previous to and at the time of her marriage; that she was at the time owner of

valuable effects and securities amounting to \$220,775.74, then held for her by trustees who subsequently placed them in her control, who thereupon allowed the defendant her husband to take possession thereof as her agent and trustee. He remained in possession thereof until September 1876, when plaintiff demanded the return thereof with an account of his management, which he failed to give. He only returned a small portion of her said fortune, disposing of the balance and appropriating the same to his own use, and refusing to account for the proceeds thereof. Further, that in December, 1880, the plaintiff was legally divorced from the defendant by a decree of the Supreme Court of the State of New York, equivalent to a divorce *a vinculo matrimonii* pronounced in favor of the plaintiff by the Dominion Parliament, and thereby became entitled to exercise all the rights of a *filie majeure usante de ses droits*. Concluding that the defendant be ordered to account for and pay over to the plaintiff the balance in his hands, and in default to do so that he should be condemned to pay the plaintiff \$222,000.

The defendant demurred to the declaration as insufficient in law, on the ground that the domicil of the parties had been for years in the Province of Quebec, and that therefore no legal dissolution of the marriage had been effected.

A hearing was had on this demurrer and it was dismissed.

To the merits the defendant Fisk, now appellant, pleaded that after the parties married in New York they came to Montreal and acquired a new domicil in the Province of Quebec, which new domicil they had at the time of the pretended divorce and for years previously; that therefore the pretended divorce was null and void and the plaintiff was not authorized to institute the action.

Also a plea of general issue, *défense en fait*.

In answer Stevens reiterates the validity and sufficiency of the divorce, averring that her husband was personally served with the complaint in the divorce suit, and appeared by his attorneys without declining the jurisdiction; that if even the divorce were invalid she would still have a right to demand from Fisk an account of his gestion of her fortune as well by the law of New York as by that of Quebec.

The facts seem to be briefly as follows:—In

1871, on the 7th of May, the parties Fisk and Stevens, both being native American citizens, were married in the city of New York in the State of New York, having then their domicile in the city of New York. In October, 1872, Fisk came to reside in Montreal and from that time continued to reside there. With occasional periods of absence, his wife finally left him in 1876, returning to New York, but thereafter passing a part of her time in Paris and part in New York. Mr. Shelburne, an attorney of the State of New York, examined as a witness, swears that after leaving her husband she was a resident of New York, particularly at the time of the institution of the action which she brought against her husband for divorce, and it is presumable that if she could have any other domicile than that of her husband it would be a reversion to her original domicile in the city of New York.

In February, 1880, she commenced a suit in the Supreme Court of New York, against her husband for divorce for cause of adultery; it was served upon Fisk at Montreal, in this Province; he appeared by attorney, and after proof had, a decree of divorce was pronounced there which is proved to be, according to the laws of the State of New York, an absolute dissolution of the marriage, *a vinculo matrimonii*, more especially as regards her, Virginia Gertrude Stevens.

At the time of the marriage she was possessed of a considerable fortune in her own right, which soon after her marriage she entrusted to the care and custody of her husband.

It appears by the proof adduced that by the laws of the State of New York the husband has no control over the separate property of the wife. She continues, notwithstanding the marriage, to exercise her rights over her own property the same as if she were a *feme sole*.

The present action was brought by her against the said Henry Julius Fisk for an account of her fortune which she had entrusted to him and for which, to a large amount, he had refused to account.

She sues as a *feme sole*, setting forth the facts of the marriage, the divorce, Fisk's possession of her funds and his refusal to account.

There is no difficulty about the facts. Fisk defends himself upon two grounds.

1st. The invalidity of the divorce.

2nd. The absence of authority on the part of the respondent, Virginia Gertrude Stevens, a married woman, to bring the action.

The second ground, according to our law and practice, would probably be a conclusive answer to the suit if true in fact, that is, if the marriage between her and Fisk still subsisted; C. C. 176: "A wife cannot appear in judicial proceedings without her husband or his authorization."

183. "The want of authorization by the husband constitutes a cause of nullity which nothing can cover."

But she may be authorized by a Judge—C. C. 178.

But if the divorce be operative the rule is of course inapplicable. The crucial question is whether the divorce so obtained from the Supreme Court of the State of New York, has force in the Province of Quebec.

In the Province of Quebec the law recognizes no right of divorce; it can only be obtained through the legislative force of the Dominion Parliament.

The main contention of the appellant is that at the time the divorce was applied for, the parties had their domicile in the Province of Quebec, and that the Supreme Court of the State of New York had no jurisdiction.

It is contended that it is actual domicile that gives jurisdiction in such cases, and that the wife being incapable of having any domicile save that of her husband, the actual domicile of Virginia Gertrude Stevens was in the Province of Quebec, in Canada, at the time she adopted her proceedings for divorce, and that she could not legally resort to any jurisdiction other than in the Province of Quebec or Dominion of Canada to obtain it.

That rule would have a very reasonable application if the actual domicile of the husband was the domicile of origin of the parties, or was even their matrimonial domicile, but there are strong, to my mind, convincing reasons why it should not apply to the present case.

In the first place the parties are citizens of another State, to a certain extent still owing allegiance and obedience to its laws, which obligations they have never repudiated, nor have they ever renounced to their claim for their protection, although by passing into another State they have thereby undertaken not to of-

fend against any of its institutions or laws. The law of the country to which they have removed does not recognise any legal right to a divorce, although it may be granted by the legislative force of an act of Parliament. Their own original State to which they still owe allegiance recognises a legal right to divorce for cause. In entering into the contract of marriage both parties stood on the same ground as regards the validity of the contract and the conditions of their consent. The subjection of the wife to the husband did not impair these conditions or the right of either party to invoke them. They married under a law which made the contract subject to dissolution for cause. Admitting that the wife undertook to follow her husband, it was always subject to the right to invoke the condition, that if the husband was unfaithful in the execution of the contract she could, for cause sufficient according to the law where the contract was made, ask for its dissolution. Could the husband by carrying her to a country where this right was not recognised deprive her of it? It seems unreasonable to say that he could. Would such an act not be a fraud upon her rights? In my opinion it would. It is vain to say that on account of the subjection of the wife she could not raise the point. Her subjection is on condition that the husband fulfils the contract on his part. What goes to the validity of the contract revives the right of the wife as a party *sui juris* seeking for its fulfilment. If the argument of actual domicile were allowed to prevail, it would in every such case put it in the power of the husband to defeat the wife's right by taking her to a place where her right could not be enforced, or even himself removing to such a place, for by fiction of law and at least for certain, and perhaps for most purposes, his domicile would be held to be that of his wife also. Again, in this particular instance the parties were citizens of New York, they made their contract there, admitting that they afterwards resided abroad. If both parties found themselves in the State of New York, would a *bona fide* suit there, not subject to the suspicion of fraud or evasion, not be competent to the parties? There seems no valid reason why it should not. The act performed in this case was equivalent to the case stated. V. G. Stevens being in the State of New York, cited Fisk from Montreal, Canada; he appeared,

which was equivalent to his being in New York and being served there; he made no objection to the jurisdiction and was condemned on evidence. Can he now repudiate the force of that decree? It is said that consent does not give jurisdiction. That is true of defect of authority in the tribunal, but it is not true of voluntary submission to or coming within the jurisdiction of a tribunal that has authority, more especially as regards a personal obligation in respect of which its fulfilment may be claimed anywhere that the law recognises it to have binding force. Especially is it appropriate that the sovereign authority which gave the contract its binding force should be the one to decree its dissolution for default of the fulfilment of the essential conditions on which its permanence was to depend.

It perhaps might, with reason, have been argued that if the tie had been created within the sovereign authority of a State whose laws did not permit of a dissolution, and the parties afterwards resorted for a divorce to New York, where the law permitted it, such divorce might be good within the State of New York, but would not be effective in the State or country of their matrimonial domicile.

It was argued that the Imperial Statute establishing the Divorce Court there, in giving authority to a resident there to be plaintiff in a divorce suit, exceeded and became an exception to the general rule which required the parties to be actually domiciled within the jurisdiction, but it seems to me that this argument is based upon the supposition that there is or ought to be such a general rule, the reason of which is not only doubted, but seriously questioned, and as I have already shown, puts it in the power of the husband to deprive the wife of all remedy. It might rather be inferred that the English legislation was the negation of any such rule, and in fact the sanction of a contrary rule as correct in principle.

Our own Civil Code, Art. 6, says:—"An inhabitant of Lower Canada, so long as he retains his domicile therein, is governed, even when absent, by its laws respecting the status and capacity of persons, but these laws do not apply to persons domiciled out of Lower Canada, who, as to their status and capacity, remain subject to the laws of their country."

This should be true as regards other countries

claiming jurisdiction over their subjects in Canada.

Bishop ("Marriage and Divorce") considers that a wife may acquire a domicile for the purposes of a divorce. This may be more true as between the States of the Federation than in regard to foreign countries, but the case is different when she is sought to be deprived of one.

It is to be borne in mind that the status of strangers is not created, but is only recognised here, that its creation abroad would have no force here save by comity, and the change of status operated by the power that created it, leaves the parties strangers with the status only which the sovereign power, to which they owe their allegiance, has given them, and in this case there is the same reason for the recognition of the status given them by the dissolution of the marriage as that first given them by the marriage itself; both acts equally depend on the foreign law, the force of which is only recognised by comity.

Acts of voluntary jurisdiction recognised by the sovereignty of each country as strictly speaking no judicial act has force beyond the sovereign territory for which and by whose power it is promulgated.

Foelix, t. 2, p. 384, No. 10, 2me ed.:—"Quant à la validité intrinsèque et pour ce qui concerne le futur conjoint étranger, il faut appliquer les lois du pays de son domicile, surtout ce qui est relatif à l'état et à la capacité de sa personne." See also *Muller v. Hilton*, 13 L. A. R., p. 1.

Le droit international, théorique et pratique, par Charles Calvi, 2me ed., t. 1, p. 366, § 247:—"Si la célébration des mariages est une affaire d'intérêt public et social, la dissolution du lien conjugal n'a pas une importance moindre; elle est régie par les mêmes principes de jurisprudence internationale. Ainsi la dissolution d'un mariage judiciairement prononcée par voie de séparation de corps et de biens, ou par voie de divorce conformément aux lois du pays où le mariage a été célébré et où les conjoints avaient leur domicile, produit ses effets dans toute autre contrée. Mais d'après quelle règle se guider et quel principe doit-on appliquer quand la rupture du lien conjugal est poursuivie dans un autre pays que celui de la célébration du domicile, ou dans un pays dont la législation diffère de celle de la patrie des conjoints, c'est là une

délicate question de droit international privé, qui a suscité plus d'un conflit. Pour la résoudre il faut tenir compte de la nationalité et du statut personnel des époux. Si les conjoints appartiennent à un pays et à une communion qui repoussent le divorce, c'est-à-dire la rupture absolue définitive du lien conjugal, et admettent seulement la séparation de corps et de biens, ils ne peuvent légitimement tant qu'ils conservent la même nationalité, la même croyance religieuse, faire dissoudre leur union matrimoniale en se transportant dans un pays où prévaut le divorce avec faculté de conclure un autre mariage; car s'ils agissaient ainsi ils s'exposeraient quand ils retourneraient dans leur patrie à y être judiciairement poursuivies et condamnés comme bigames. Lorsqu'au contraire les époux appartiennent à un pays dont les lois intérieures sanctionnent le divorce, et qu'usant du bénéfice des lois qui régissent leur statut personnel ils ont régulièrement fait prononcer la dissolution complète de leur mariage, ils doivent partout ailleurs être considérés comme célibataires et libre de contracter une nouvelle union matrimoniale.

"En résumé, la règle à suivre en cette matière est bien moins la loi du domicile que celle de la religion, de la nationalité, et du statut personnel qui en découle."

The Italian author Fore, as translated into French by Pradier Fodéré, edition of 1875, at p. 216, No. 120: after giving the opinion of Bocco, Italian Jurist, wholly to the effect that the dissolubility or indissolubility of the marriage tie, in other words the question of the right of divorce, must be determined by the law of the matrimonial domicile. This proposition in its broadest sense, Fore disputes, but after reviewing the jurisprudence of different countries, including England, France, Austria, Prussia, the United States of America and Italy, and the opinions of various Jurists, including Merlin, Westlake, Dalloz, Demolombe and others, as well as different arrêts involving various phases of the question, he concludes by giving a kind of qualified assent to Bocco's opinion, which he does in this wise. He puts the question: "Si un homme légitimement divorcé dans sa patrie peut se remarier dans un état tiers dont la loi ne permet pas le divorce." He remarks: "Cette question a été longuement discutée par les jurisconsultes et par les tribu-

naux." He reviews the opinions and decisions on the subject, the weight of which are in favor of validity, and concludes as follows:—

No. 134. "Nous partageons la même opinion et en en faisant l'application nous disons que l'officier de l'Etat Civil ne peut refuser d'assister au mariage d'une anglaise ou d'une polonaise valablement divorcée, et qui voudrait se remarier en Italie. En effet il est certain que la condition juridique d'un étranger et sa qualité de père, de fils, d'époux, doit se déterminer d'après la loi de sa nation, que les effets qui dérivent de l'état juridique d'un étranger ne peuvent être empêchés que lorsqu'on oppose une loi d'ordre publique de notre Etat; que l'officier de l'Etat Civil ne peut déclarer la dissolution du mariage non existant, quand celui-ci a été déjà légalement dissous, et qu'il ne peut empêcher le divorcé de contracter un nouveau mariage, lequel lorsque le premier est dissous, n'est nullement contraire à nos lois, le divorcé étant dans la situation légale d'un homme non marié. Nous concluons donc que défendre à qui est légalement divorcé de pouvoir contracter un nouveau mariage en Italie est contraire à nos institutions et à nos lois."

See *Harvey v. Farnie*, L. B. Appeal cases, vol. 8, p. 43; Law Times Rep. for 1859-60, vol. 2, p. 542.

MONK, J., concurred in the above dissent.

RAMSAY, J. This action was brought by the respondent, who alleges that she is the divorced wife of the appellant, asking him for an account of the fortune she brought him at her marriage and which passed into his hands.

She alleges that she was married in the State of New York in May 1871, New York being then the domicile of both parties, that by the law of that State, there being no ante-nuptial contract, she had the absolute control of her property, and she alleges further that by a decree of the Supreme Court of New York she was divorced from her said husband, and that she is thereby in the position of a *feme sole* and entitled to bring this action as such.

The appellant pleaded that the parties after their marriage came to Montreal and acquired a new domicile in the Province of Quebec, which new domicile they had at the time of the pretended divorce which is therefore null, and that plaintiff could not bring this suit.

There was also a *défense en fait*.

The respondent replied, that the husband was served with the action in New York, that he appeared and did not decline the jurisdiction of the Court.

The questions that arise on these pleadings are; 1st.—Is the divorce valid? 2nd.—If not a divorce here, could the wife bring the action without authorisation; and subsidiarily thereto, is the absence of authorisation properly raised by demurrer and plea to merits? And 3rd.—Does the failure of the husband to decline the jurisdiction of the Court in the State of New York make its decision *res judicata* as against him?

The first of these questions is manifestly the most important and the most difficult. In deciding it we must have recourse to our own law, if its rule can be discovered. But before we attempt to lay down principles, it is necessary to arrive at a definite conclusion as to the main facts that are contested. It would seem that it is not denied that by the law of the State of New York the married woman's property remains separate, and her own, unless there be some special disposition of it. Whether this be the sound exposition of the law of that State we are not now called upon to enquire, as no such question appears to have been raised, and on *faits et articles* the husband admits having received a tin box containing securities in bonds and cash, "the separate property and fortune" of respondent. Both parties were American citizens, although the State of New York was not the native State of either; but both seem to have had their principal abode there, where the marriage was celebrated, and where they lived, except for short periods till the autumn of 1872.

It seems also clear, that appellant and his wife took up their abode in Montreal as their permanent residence, and that the husband acquired a new domicile there which became that of his wife. She could have none other, according to our law, unless separated from bed and board. C. C. 83. It is, however, proved that the respondent at the time of instituting the suit for a divorce in New York, had that sort of residence there, which, by the laws of that State, give jurisdiction to its courts to pronounce a decree in divorce.

The precise legal question we have, then, to decide is this—whether a wife domiciled with

her husband in the Province of Quebec can of her own movement, and without any separation as to bed and board, remove to another place, take advantage of the law of the place of marriage to obtain a divorce *a vinculo matrimonii*, which is absolutely prohibited by the laws of this Province, and afterwards come back here and act as an unmarried woman.

It is argued that if she cannot do this, it is competent for any man, married in a country where divorce *a vinculo* is permitted, by changing his domicile, to deprive his wife of the advantage of dissolubility, if I may use such a word. I am not sure that this is the necessary consequence of refusing the wife the rights claimed in this case; but if it were, I am not prepared to say that this argument appears to me to be conclusive. In one sense it may be considered a hardship to the wife, but it is one against which it can hardly be expected our law should specially provide. The remedy for the evils complained of by the respondent, is the separation *à mens et thoro*. Our law having provided a remedy, and having positively refused another, I do not think, the husband having retained his domicile in this Province, his wife can seek another domicile and destroy the *status* of an inhabitant of Canada.

The case of *Rogers v. Rogers* (3 L. C. J. 65,) was cited in support of the contrary view. But in that case all that the court decided was that community did not exist between husband and wife married in England, then their domicile, subsequently removing to Canada. The doctrine recognised by this decision may perhaps be doubted (*Story, Conflict of laws* §176) It seems, however, to be the doctrine of Pothier. But the discussion turns entirely on the question of whether community is a *Statut réel* or *personnel*, and consequently it does not apply to the case before us, because we are not to consider the effects on the property of the conjoints but as to their personal *status*.

On the second question I am of opinion that the judgment of the Supreme Court of the State of New York does not produce the effects of *res judicata* as against the husband. It is essential that the Court should be competent. Now, the competence does not mean that the Court shall be competent according to the laws of its own State, but that its modes of procedure be not an infringement of the rights of

another State. Summoning Mr. Fisk domiciled in Canada to appear in New York is summoning him to appear before those who are not his natural judges. And his appearance, without further proceedings, does not appear to me to alter the matter.

It has been said that this action lies even if there be no divorce, and that the husband is obliged to account to his wife for her property. This is very true, but it is contended that she has brought the action as an unmarried woman and without authorization. The prohibition of our law as to the wife appearing in judicial proceedings without the authorization of the husband is express (176 C. C.), and I am not aware that there is any mode of supplying this authorization after the suit is commenced. "She cannot appear," and therefore she is not rightly before the Court, and it is not a question of amendment. To substitute an authorization by the Court is to antedate a power, and one which can only be exercised by the Court on the refusal of the husband (C. C. 178) or if he be interdicted or absent, (C. C. 180). But it is said the want of authorization has not been properly pleaded, and a case of *Anntaya v. Dorge* et al., (6 R. L. 727) was cited in support of the pretention that this question could only be raised by a preliminary plea. I question very much whether if the defect appears on the face of the proceedings it is necessary to plead it at all, but I think it at all events is a good plea to the merits. It is not a question of *status* only, it is a lack of power. But in addition to this, the whole of the action turns on the alleged fact that she is an unmarried woman.

I am therefore to reverse and dismiss the action *sauf à se pourvoir*.

The following is the judgment:—

"Considering that the parties in this cause were married in the year 1871 in the State of New York, one of the United States of America, where they were then domiciled;

"Considering that shortly after, to wit, about the year 1872, they removed to the City of Montreal, in the Province of Quebec, with the intention of fixing their residence permanently in the said Province;

"And considering that the said appellant has been engaged in business and has constantly

resided at the said City of Montreal since his arrival in 1872, and that he has acquired a domicile in the Province of Quebec;

"And considering that the female respondent has only left the domicile of her husband at the City of Montreal in 1876, and obtained her divorce from the appellant in the State of New York in the year 1880, while they both had their legal domicile in the Province of Quebec;

"And considering that under article 6 of the Civil Code of Lower Canada, parties who have their domicile in the Province of Quebec are governed even when absent from the Province by its laws respecting the status and capacity of such parties;

"And considering that according to the laws of the Province of Quebec marriage is indissoluble, and that divorce is not recognized by said laws, nor are the Courts of Justice of the said Province authorized to pronounce for any cause whatsoever a divorce between parties duly married;

"And considering that the decree of divorce obtained by the female respondent in the State of New York has no binding effect in the Province of Quebec, and that notwithstanding such decree, according to the laws of the said Province the female respondent is still the lawful wife of the appellant, and could not sue the said appellant for the restitution of her property without being duly authorized thereto;

"And considering that the said respondent has neither alleged nor produced any authorization, as required by law, to institute the present action, and that there is error in the judgment of the Superior Court rendered at Montreal on the 25th day of February, 1882;

"This Court doth reverse the said judgment, and proceeding to render the judgment which the said Superior Court should have rendered, doth dismiss the action of the said respondent *sauf à se pourvoir*, with costs, as well those incurred in the Court below as on the present appeal (Judges Monk and Cross *dissenting*)."

Judgment reversed.

Kerr & Carter for the Appellant.

E. Lafleur for the Respondent.

SUPERIOR COURT.

MONTREAL, September 27, 1883.

(In Chambers.)

Before TORRANCE, J.

MILLOY v. O'BRIEN, and BURY et al., assignees,
and MILLOY, petitioner.*Costs in Review—Discontinuance after factum
filed.**Where the party inscribing in Review discontinued
after inscription and after factum has been
filed by respondent, the latter is entitled to costs
as of a case settled before hearing.*

Motion to revise taxation of costs, which allowed defendant's attorney a fee of only \$8, (instead of \$20 as claimed), where the plaintiff had desisted from his inscription in Review after defendant's factum was filed.

The Judge granted the motion and allowed a bill of \$30.53, viz.: appearance \$3, attorney \$20, factum \$6, bill \$1.55.

Motion granted.

Doherty & Doherty, for plaintiff.*J. L. Morris*, for defendant.

CIRCUIT COURT.

MONTREAL, October 16, 1883.

Before RAINVILLE, J.

EVANS v. HURTUBISE, and De BERCEY, adjudica-
taire, petitioner.*Procedure—Jurisdiction.**Under a judgment in the Circuit Court certain real
estate of defendant was sold by the sheriff, who
filed his return in the Superior Court, and the
report of distribution was made there. The de-
fendant refused to give possession. Held, that
the application of the purchaser for a writ of
possession should be made to the Superior Court
and not to the Circuit Court.*

RAINVILLE, J., said although the suit was in the Circuit Court, this Court had no jurisdiction to grant a writ of possession, as the sheriff's return had been filed in the Superior Court, and the report of distribution had been made there.

Petition dismissed without costs.

J. L. Morris, for petitioner.*Loranger & Beaudin*, for defendant.

RECENT QUEBEC DECISIONS.

Curator to délaissement.—The functions of a curator to a *délaissement* cease by the payment of the hypothecary debt, *ipso facto*.—*Moncalet v. Ross*, 27 L. C. J. 218.*Jurisdiction—Cause of action.*—Le contrat par un *negotiorum gestor* ne lie les parties qu'après que l'obligé a été averti par le représenté qu'il le ratifiait, que le lieu du contrat est celui où l'obligé en a reçu et accepté la proposition, et qu'une condition de livraison dans la province de Québec n'est pas suffisante pour donner juridiction au tribunal du district où elle devait s'effectuer, et permettre d'y assigner la partie qui résidait et s'est obligé dans la province d'Ontario.—*Tourigny v. Wheeler*, Court of Review, Quebec, Stuart, Casault and Caron, JJ., 9 Q. L. R. 198.*Quebec Controverted Elections Act, 1875—Deposit.*—The petitioner, and not his attorney, is given by the Statute the right to withdraw the deposit.—*Dionne v. Gagnon*, S. C., Quebec, Alley, J., 9 Q. L. R. 210.*License Act—Prohibition.*—The Legislature of the Province of Quebec was duly vested, under the B. N. A. Act, 1867, with power to enact the provisions contained in the 2nd and 71st sections of "The Quebec License Law of 1878."—*Dion v. Chauveau et al.*, S.C., Quebec, Alley, J., 9 Q. L. R. 220.

GENERAL NOTES.

In *Mullaly v. People*, 87 N.Y. 367, the dog was eulogized by the Court in the following strain:—"When we call to mind the small spaniel that saved the life of William of Orange, and thus probably changed the current of modern history (2 Motley's Dutch Republic. 398); and the faithful St. Bernard, which, after a storm has swept over the crests and sides of the Alps, starts out in search of lost travellers, the claim that the nature of a dog is essentially base, and that he should be left a prey to every vagabond who chooses to steal him, will not now receive ready assent."The French "executioner of high works" for the time being is M. Diebler. M. Diebler succeeded the better known M. Roch. If an annalist in the *Figaro* is to be believed, the existing executioner languishes for want of occupation, and is by no means grateful for M. Grévy's excessive humanitarianism in keeping him in enforced idleness. He used to be in the enjoyment of a salary of £320 a year, but in consideration of the office being almost a sinecure it has recently been reduced to £240. M. Diebler naturally is not content, and longs for more heads to operate on, for which he is entitled to an extra fee of £8 and travelling expenses.

The Legal News.

VOL. VI. OCTOBER 27, 1883. No. 43.

A STRANGE PORTRAIT.

Once upon a time extraordinary presentations of Canada and Canadian affairs were not uncommon in American journals, but we were under the impression that they were becoming things of the past. Facility of intercommunication is rapidly effecting a wonderful change in the notions which the people of different countries formerly entertained of one another. But the *American Law Review* treats us to some surprising information about ourselves written after the old fashion. The article has reference to Lord Coleridge's change of programme as respects Canada. Our witty contemporary the *Albany Law Journal* referred to this as follows:—"Our brethren on the Thames and on the St. Lawrence should remember that Lord Coleridge is not so young as he once was, and that we, as his hosts, feel bound not to endanger his health by any such hyperborean journeys as the Canadians would gladly tempt him into. There is no telling where these Canadians would stop. They might persuade his lordship into an arctic exploring expedition." We relish this fun as much as any of our neighbours, but what is a jest in the columns of our Albany contemporary is proclaimed in sober earnest at St. Louis. The British provinces, we are told, "are the tail end of an Empire; they are destitute of distinction in arts, in literature, in agriculture, in manufactures, and in mechanical inventions.".... "They have a vice-regal Court, with its dudism and low-necked dresses. They also have a few hereditary titles. Their courts are modelled in close imitation of the present English system, and they have justices who would regard it almost a contempt of court to have an American law book read to them. They regard us as a sort of a *koom posh* people, whose judges, legislators, and public men are universally corrupt, and who are going to the dogs as fast as possible.... They are trying to build a transcontinental railway along the margin of the frozen

"zone—not because it is called for by a single demand of commerce, but because it will promote a visionary dream of empire. There is really no hope for their young men; for every good place in their vast mercantile houses, and in their educational and civil service, is filled by young nincompoops imported from England; and from all the provinces, east and west, they are making to the States in great numbers. Canada is like a breeding ground of migratory arctic birds."

This would be very amusing as an after dinner sally by Mark Twain, but "there is no hope for" the man who seriously believes such ludicrous nonsense. At any rate it would be out of place in a legal journal to try to enlighten a writer, whose law may be very good, but who is so woefully astray in his facts. We do not think it right to devote our space to showing, for instance, that many of the States have been beaten by this "tail end of an empire" in growth of population; that as to agriculture, notwithstanding protective duties, the people of the States are generally willing to pay us our own prices for our butter, our apples, our potatoes, hay, and other products; that our literary men, however "destitute of distinction," are, at any rate, known so well that our neighbours have drawn several of their most brilliant preachers from their ranks: that the transcontinental railway, far from being the prompting of a visionary dream, has gradually gained over to its praise those who, like the *London Times*, most bitterly opposed it a few years ago; that our leading universities have at their head Canadians born, instead of "nincompoops from England;" that the most important offices everywhere, including the judicial bench, are filled by Canadians; that many of those who are "making to the States" are leaving their country for their country's good. All this is outside of our functions as conductors of a legal journal, but we may properly point out the curious blunder of our St. Louis contemporary with regard to the citation of American law books. So far from being considered a contempt of court, we venture to think that the leading writers of the United States—Story, Kent, Parsons, Bishop, Redfield, Cooley and others, as well as the principal State reports, are as much read and as often cited in our courts, and received with as much respect where they are applica-

ble, as they are in the courts of the Union. We do not know where our St. Louis contemporary could have picked up such a wonderful account of us, but we suspect that the writer, if he ever visited Canada, must have fallen into the hands of a Canadian Mark Twain and been very badly stuffed.

JUDICIAL SYSTEMS OF ENGLAND AND THE UNITED STATES.

The speeches of Lord Coleridge since his arrival in America have presented little that arrests the attention, still less that merits reproduction. His Lordship is an easy, graceful speaker, and the observations which he has been forced to make on the several occasions, festive or otherwise, on which he has appeared before public assemblies in America as a distinguished guest, are quite in keeping with his reputation as a genial and accomplished man of society, but they are unmistakably common place. It is but fair to add that the Lord Chief Justice is one of the least pretentious of individuals, and that he frankly and modestly ascribes to the kindness and friendship of Mr. Gladstone rather than to his own merits the elevated position which he occupies. In fact, he quite underrates rather than over-estimates his own abilities. But while we have looked in vain for originality or brilliancy in his lordship's speeches, they are at least free from aught that could be regarded as offensive or undignified. The Chief Justice had to listen to a great deal of "tall talk", as, for example, at the formal reception by the N.Y. State Bar Association, Oct. 11, when Mr. Shepard began his introduction of the guest in these terms: "England and America are met together; righteousness and peace have kissed each other. Stars of the first magnitude in the legal heavens come into conjunction when to you, sir, as chief judge of five and a half millions of freemen, elected thereto according to the forms prescribed by our Constitution," &c &c. Mr. Shepard could not understand how ridiculously this stuff sounds in English ears; but his lordship was uniformly courteous and accepted with unflinching gravity and good humor all the prodigious compliments lavished upon him. On the occasion referred to, his lordship adverted at some length to the differences in the judi-

cial systems of England and the United States. The following extracts from his speech, which was one of the most elaborate which he has made in America, are of interest:—

"It seems to me that there are one or two other differences, which upon clear, good and entirely uncontradicted evidence, exist between our system and yours. I am told with one voice that our courts in England go faster than your courts in America, and I cannot say with what pleasure an old, narrow-minded insular received the intelligence that in anything—even in a lawsuit—the old country went faster than the new. I am told also—and it seems to be the fact—that the judges in England take the liberty of assuming more the direction of affairs in cases which are tried before them, whether with or without a jury, than the practice of some of your States and the actual statutes in others permit to the judges in this country. It is not for me to express an opinion as to whether you are right or wrong. From our point of view, and in our circumstances, I cannot help thinking we are right; but nevertheless, I am not so presumptuous as to deny that it is very likely that from your point of view, and in your very different circumstances, you may be right, too, because, where the circumstances differ, the conclusions will naturally not be the same. One thing seems to me clear—that in England, with our fewer judges, we dispose, and dispose without arrears, of a very sufficient and satisfactory number of cases; and in this country upon the whole, in many States, and certainly, as I understand, in the courts of the Union, there is a very considerable arrear at the present time.

"You are probably aware that we in England have been engaged for the last ten years, beginning in 1873, when, as attorney-general, I was responsible for passing the Judicature Act through the House of Commons, in endeavoring to cheapen, and simplify and expedite our procedure upon the lines of those salutary statutes which the wisdom of Parliament enacted about thirty years ago (in 1852-54).

"At this moment, a committee, of which I have the honor to be chairman, having reported in favor of certain amendments, the judges have made large alterations in our rules of procedure, which I hope may be beneficial, but which I am not wise enough to undertake to

say will be beneficial; for no man can hope to tell, without practical experience, what will be the real operation of a new Code of Procedure.

"But it was high time that something was done to expedite, and amend and simplify the common law, which deserves all the praise which your chief judge and Mr. Evarts have lavished upon it, and which, some thirty years ago, was in serious danger.

"It had become associated in the minds of many men with narrow technicality and substantial injustice.

"That was not the fault of the common law, but it was the fault, if fault it were, of the system of pleading, which looked at practically, was a small part of the common law, but very powerful men had contrived to make it appear that it was almost the whole of it—that the science of statement was far more important than the substance of the right, and that rights of litigants themselves were comparatively unimportant unless they illustrated some obscure, interesting and subtle point of the science of stating those rights.

"Now, I prefer to confirm what I am telling you, by authority much greater than my own, because it might be said, and said with truth, that I was merely condemning a system which I possibly disliked, because I never was very proficient in it. I well recollect to have heard Sir Wm. Erle, who was a great lawyer, who was chief judge of the Common Pleas, and whose name may be known to many of you on this side of the Atlantic—relate a remarkable conversation that took place between a learned baron—a famous man of those days—himself, and a third person, very distinguished in his day, but little remembered in the present: Charles Austin, a man of singular gifts of mind, who devoted himself chiefly to making a fortune, and whose reputation, immense with his contemporaries, is chiefly known to posterity by a striking sketch of him, given in his autobiography. These three men were in a London Club, and the baron said that he had joined in the building of sixteen volumes of *Meeson & Welsby*, and that that was a very great thing indeed for any man to do. Sir Wm. Erle, with more candor than courtesy, replied that it was a fortunate thing there had not been a seventeenth volume of *Meeson & Welsby*, for if there had, the common law

would disappear from creation amidst the universal jeers and hisses of mankind, and Charles Austin followed up this observation of Sir Wm. Erle, in this way: he said: 'I have heard you say that before, baron, and suppose there is something in it, but now, in candor—in the palace of truth—do you think that the world, or that England itself, would have been the least worse off if every case in every volume of *Meeson & Welsby* had been decided the other way?' Now, you must not pursue a story, you know, beyond its legitimate conclusion, and what exactly it was that the learned baron answered, I am really unable to say; but it is a comfort to think that those subtleties, if there was any merit in them, have not entirely been banished from the earth, and I am told that there is a State in this progressive Union in which they are, at this moment, as alive as ever, and I venture upon this subject, to make you a practical suggestion.

"You have lately procured, may I say most wisely, a great National Park, into which the beauties and glories of nature, and the strange and eccentric forms which natural objects sometimes assume, may be preserved forever for the instruction and delight of the citizens of this great republic. Could it not be arranged, that with the sanction of the State, some corner in that one State should be preserved, as a kind of pleading park, in which the glories of the *negative pregnant*, *absque hoc*, *replication de injuria*, *rebutter* and *sur-rebutter*, and all the other weird and fanciful creations of the pleader's brain might be preserved for future ages to gratify the respectful curiosity of your descendants, and that our good old English judges, if ever they re-visit the glimpses of the moon, might have some place where their weary souls might rest—some place where they might still find the form preferred to the substance, the statement to the thing stated. I cannot help thinking that that would be a matter worthy of the liberality, of the genius and conservative instincts of the great American public. But it is really, to speak seriously, a great pleasure for me to find that slowly, and if I may say so, with wise hesitancy, you are gradually admitting into your system those changes which we have lately made, as and when they satisfy the needs, the temper, and the genius of your people."

THE GOVERNOR GENERAL.

The present week has been marked by a change of Governor General, but to us an incident of this nature has only social and historical significance. It has less effect upon the money market than a slight attack of indigestion suffered by a railway magnate has upon the susceptible financial pulse of our republican neighbours. The Marquis of Lorne and the Princess Louise leave our shores with the respect and good wishes of all. They have done much during the last five years to dispel the misconceptions about Canada which existed on the other side of the Atlantic. The Marquis of Lansdowne, who has assumed the administration, is of distinguished ancestry, and unblemished reputation. He has already had considerable experience in state affairs, and although he may not have the wit and brilliancy of a Dufferin there can be no doubt that he will fill with dignity and tact the office which he has been pleased to accept. His Excellency speaks with purity both the languages in use in our country. This has been noticed by the daily journals as though it were remarkable that an English peer should speak French with a pure accent. The circumstance is far from unusual among educated Englishmen, and in the case of the Marquis his connection on the maternal side with the Comte de Flahaut makes it quite natural that he should be conversant with the French language.

NEW BOOKS.

INSANITY, considered in its Medico-Legal Relations, by T. R. Buckham, A.M., M.D.—
J. B. Lippencott & Co., Philadelphia,
Publishers.

Dr. Buckham explains in his preface that the chief objects in view in this work were "to point out the pernicious uncertainty of verdicts in insanity trials, with the hope that by arousing attention to the magnitude of the evil, at least some of the more objectionable features of our medical jurisprudence may be removed; to faithfully call attention to the more prominent causes of that uncertainty; and, with the most friendly feelings for both my own and the legal profession, to criticise severely, and to censure when necessary, not the individuals, but the

system which has made insanity trials a reproach to courts, lawyers, and the medical profession." The author supports the "Physical Media theory," i. e., that in this life the mind is wholly dependent for the manifestation of its operations on certain organs of the body designated physical media. Insanity, in his view, may correctly be defined as follows:—
"A diseased or disordered condition, or malformation, of the physical organs through which the mind receives impressions, or manifests its operations, by which the will and judgment are impaired, and the conduct rendered irrational." And, as a corollary, it is laid down that insanity being the result of physical disease, it is a matter of fact to be determined by medical experts, not a matter of law to be decided by legal tests and maxims. The medical experts here referred to are those who have made a special study of the subject, not general practitioners, the calling of the latter to give evidence in insanity cases being strongly denounced. We have indicated the scope of the work before us. It is well known that the ordinary tests of insanity have not worked satisfactorily in the past. As an eminent specialist (Dr. Maudsley) has said, "were the issue to be decided by tossing up a shilling it could hardly be more uncertain." Dr. Buckham is entitled to an attentive hearing. He has treated his subject in an interesting manner, all technicalities being avoided, and the time expended in the perusal of his work will not be wasted.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, September 24, 1883.

DORION, C.J., MONK, RAMSAY, TESSIER and
CROSS, JJ.

FLETCHER (plff. below), Appellant, & THE MUTUAL
FIRE INSURANCE CO. FOR STANSTED & SHEP-
BROOKE COS. (defts. below), Respondents.

*Procedure—Jury Trial—Motion for judgment on
the verdict.*

*The motion for judgment on the verdict, in a civil
case, can only be opposed by means of a mo-
tion for a new trial, a motion in arrest of*

judgment, or a motion for judgment non obstante veredicto (422 C.C.P.); and where these motions had been made unsuccessfully by the defendant, and the plaintiff then moved for judgment on the verdict, the findings of the jury must be taken as they stand, and the plaintiff's motion for judgment on the verdict will be granted if the findings of the jury are in his favor.

The action was brought in the Court below on a policy of insurance for \$800. The case was tried before a jury, and a special verdict was found, in the form of answers to 29 questions. The company moved for a new trial, in arrest of judgment, and for judgment *non obstante veredicto*. These motions severally failed. The plaintiff then moved for judgment on the verdict, which was granted by the Court at Sherbrooke. The Court of Review at Montreal set aside this judgment, "considering that the facts of record established that plaintiff was not proprietor of the premises insured by him when he made the insurance, and that by the Consol. Stat. of L. C., ch. 68, s. 25, the policy was void." See 5 Legal News, p. 55. The appeal was from the judgment in Review.

Brown, for the appellant, contended that the Court could not examine the evidence on a motion for judgment on the verdict. There was no case on record where a court had reversed a judgment founded on a verdict, for the reason that the verdict was not supported by the evidence. In the next place it was contended that the appellant was, in fact, the owner when the loss occurred, and that the verdict was in favor of the appellant on this point.

Wm. White, Q. C., for the respondents, contended that the verdict did not entitle the appellant to any judgment. The answer to the question, whether the plaintiff was owner, was "the jurors think he was." The verdict really sustained the defence, and the Court of Review was right in setting aside the judgment in favor of the appellant.

Ramsay, J. It is not very easy to seize the difficulty in this case, which seems to be created by some rigid interpretation of articles of the Code of Procedure.

An examination of the jury process will

obviate any difficulty so created, by giving the key to the proper interpretation.

Under the system of the general verdict, there was no difficulty as to the person who had obtained it—the finding was for the plaintiff or for the defendant. The verdict was then checked by one or other of three motions. There was a motion to arrest, or for a new trial, or motion *non obstante*. With the special findings on interrogatories, another difficulty arose—it was as to which party had gained by the verdict. In other words, what was the result of these findings? Now that question can never be affected by the article of the code which says that the motion for judgment on the verdict can only be opposed by the three motions, (Art. 422, C. C. P.) What the article means is this, that if one party has got answers, the logical result of which is to give him a right to the verdict, no one can go behind these findings but by the three motions. In other words, you cannot attack the findings of the jury but in the three ways indicated. Of course, if the delay for taking advantage of these methods is expired the findings must be taken as they stand.

Now what were the issues?

The first issues raised by the pleas are:

That appellant was not owner;

That the property was encumbered otherwise than he had declared;

That there was over-valuation.

Do the findings in fact cover these issues in such a way as to give appellant a right to judgment?

The only point upon which there seems to be the least obscurity is the appellant's title to the property. He has had to make up a title, beginning in a verbal title, but dating back as far as 1872. The policy is in 1874, and in 1872 the property was bought in at public auction for appellant. I don't think now we can go into the question of whether this was properly proved or not.

There is no finding to support the allegation that there was any mis-statement as to the property. "The jurors think he did not conceal facts." They do not know "that the property was encumbered." Again, they distinctly say there was no over-valuation.

As the verdict is not attacked in the only manner permitted by law, and as the findings

are clearly in favor of the appellant I am to reverse, and give plaintiff judgment on his motion.

The judgment is as follows :—

"Considering that the jury sworn to try the present case have, by their answers to the questions submitted to them, found in favor of the appellant, plaintiff in the court below, and that they have assessed the damages which he has sustained by the fire mentioned in the pleadings in this cause at the sum of \$600;

"And considering that the motions made by the respondents in arrest of judgment, for judgment *non obstante veredicto*, and for a new trial, had been disposed of when the case was heard before the Superior Court on the motion of the appellant for judgment on the verdict;

"And considering that the said motion, not being opposed in the mode prescribed by article 422 of the Code of Civil Procedure, the appellant was entitled to his judgment on the verdict;

"And considering that there was no error in the judgment rendered by the Superior Court at Sherbrooke on the 18th day of May, 1881, and that there is error in the judgment rendered on the 31st day of January, 1882, by said Superior Court sitting in Review;

"This Court doth reverse the judgment rendered by the said Superior Court sitting in Review on the 31st day of January, 1882, and doth confirm the judgment rendered by the said Superior Court, at Sherbrooke, on the 18th of May, 1881, and doth condemn the respondent to pay the costs as well those in the Superior Court as those incurred in Review and on the present appeal."

Judgment reversed.

Ives, Brown & French for Appellant.

Camirand & Hurd for Respondent.

W. White, Q. C., counsel.

COURT OF QUEEN'S BENCH.

MONTREAL, September 19, 1883.

DORION, C.J., MONK, RAMSAY, CROSS & BABY, JJ.

BENOIT (plff. below), Appellant, & BRAIS (deft. below), Respondent.

Promissory note signed by error—Evidence.

The defendant, sued on a promissory note, pleaded, in the first place, that the signature was a forgery, but subsequently amended his plea, and

alleged that he signed the note by error, intending to give a receipt for the amount stated therein. Held, that in the case of an illiterate person who signed by making his mark, this change of defence was not an indication of bad faith, and, the evidence appearing to the Court to sustain the amended plea, the judgment dismissing the action was confirmed.

The action in the Court below was brought upon a promissory note for \$710. This note was signed by the defendant with a cross, in the presence of a witness, and was payable on demand with interest.

The plea was that the defendant did not sign the note, and had no reason to do so, seeing that the plaintiff Benoit was at the time his debtor. At the trial it appeared that the defendant Brais had really made his mark on the document produced. He then obtained leave to amend his plea, and pleaded that he is unable to read, and that he signed the paper as a receipt for a sum of \$710 paid to him by Benoit.

It appeared that Brais sold a property to Dr. de Grosbois in 1872 for \$5,000. Benoit bought the same property from De Grosbois and assumed the payments coming due, which were at the rate of 6,000 francs per annum. On the 1st November, 1874, there were \$500 due as principal and \$210 as interest, making \$710, the amount of the note in question.

The Court below was of opinion that the note sued upon had in fact been given as a receipt for this sum, and the action was accordingly dismissed.

RAMSAY, J. There is a question of procedure raised on this appeal, which appears to me to have no solid foundation. Appellants complain of a surprise, and that a certain notice of *enquête* for the 7th May, 1880, was originally for the 6th, and that it appears on the face of it to be altered. The attorneys of the appellant are not those of plaintiff in the Court below, and it seems that Mr. Longpré after this, on the 12th May, 1880, accepted service of the notice of hearing on the merits, without any sort of reserve or objection. In addition to this, it is difficult to see what appellant has suffered from this alleged surprise—what more he has to offer to the Court on the point, the whole case being a very simple one. Appellant sued the

Respondent for the amount of a promissory note made in the following terms:

"ST. BRUNO, 5 Décembre, 1874.

"Pour valeur reçue, à première demande, je promets payer à Adolphe Benoit, la somme de sept cent dix piastres courant, avec intérêt.

"A. M. ^{sa} X BRAIS.
marque.

"F. H. N. BERTHIAUME,
"Témoin."

At first respondent pleaded to this action that he never signed such a note, and that it was a forgery, and he supported this plea by affidavit. Later, he moved to be allowed to amend his defence, and to be permitted to plead that he had signed, by his mark, the note in question, but that he intended to give a receipt for this amount of money. As to the change of means of defence, it is insisted that it is evidence of bad faith, and that the new plea is an admission of the falsity of the former plea, the truth of which was vouched for by affidavit. I cannot draw the conclusion from this change of plea appellant does. It is true that the two pleas are incompatible, but it is to be remembered that the signature to the promissory note was simply the mark of an illiterate person (made, too, by another; Ev. of Berthiaume, pp. 8 and 11), who now says he thought he was signing a receipt. If it be true he was in error as to the nature of the document, it is not wonderful that he should plead that he did not sign a promissory note, and if he pleaded that in good faith, it is no evidence of turpitude that he should swear to it. Deprived of all sensational matter, the case resolves itself into this: did defendant sign the note by error? It is purely a question of evidence.

The evidence adduced by appellant is to me far from tending to give force to his case. The notary Berthiaume, brother-in-law of appellant, knows nothing of the transaction beyond the fact that plaintiff and defendant came and asked him to make a note and that he did it. No money passed, and nothing was said as to where the money came from. This is not very conclusive, it is true, but it is unusual among people of that class, carrying out a transaction before people who knew their affairs generally. On the other hand, respondent persisted in the attempt to establish that he could not have signed the paper in question at St. Bruno, as he

was at Montreal on the 5th December, 1874. Again, I cannot consider the evidence of broken conversations with appellant as of any weight. The exact fidelity of the memory as to the words used, is more than questionable. The conversations with Berthiaume are not evidence at all, except in so far as they might affect his character for veracity, for his evidence is really little more than negative.

So far as I can see, the key to the mystery is to be found in the evidence of the appellant. I think it is impossible to believe his story. At the time the note was made, the legal relation between respondent and him was that of debtor and creditor. Now he wishes us to believe that he then, being indebted to respondent in a sum almost precisely, if not precisely the amount of the note, lent him \$710, payable on demand with interest, and that he went on paying to respondent and to his son, without ever demanding payment of this demand note. Again, he tells us that he knew of a donation by respondent to his son which was not signified to him; he can't tell how he knew it, and that after that he dealt with the son and not with the father. This is not true. On the contrary, he admits having taken another note from respondent as a protection, and it appears by the action that on the 2nd November, 1875, (nearly a year later than the date of the note sued on), he took another note in notarial form from the respondent for \$200, which was afterwards taken as part payment of the account between Benoit and Brais, father or son. We thus find a notable contradiction in appellant's testimony, and evidence of a course of proceeding identical to that followed on the present occasion, according to respondent's pretention.

There is still another point more conclusive. After a great deal of beating about the bush, appellant says that he got the money he lent to respondent from a *dépot* in the hands of Berthiaume, a day before from Berthiaume; and yet he does not venture to ask his brother-in-law one word about this matter, although he was twice examined as a witness. Under these circumstances, I see no reason to reverse the judgment of the Court below.

Judgment confirmed.

Préfontaine & Co. for appellant.

Lacoste & Co. for respondent.

COURT OF REVIEW.

MONTREAL, September 19, 1883.

DORION, C. J., MONK, RAMSAY, CROSS and BABY, JJ.

DOMINION OIL CLOTH CO. (def. below), Appellant,
and MARTIN (plff. below), Respondent.*Evidence—Variation of written contract by parole.*

Testimony cannot be received to vary the terms of a written instrument; hence where the defendant, by an agreement in writing, undertook to grind the green furnished by plaintiff in pure linseed oil, the defendant could not be allowed to prove by testimony that the plaintiff verbally requested him to use other materials.

The appeal was from the judgment of the Superior Court, Torrance, J., reported in 4 Legal News, p. 237.

RAMSAY, J. This action arises out of a contract passed on the 22nd February, 1877, between the company, appellant, and the respondent, by which, in effect, the respondent agreed to supply the company appellant with a dry green paint of a specified kind, and to allow the company, appellant, to use his registered trade-mark on the green paint manufactured by the company by grinding in oil. There were stipulations in the contract obliging the company to grind the best linseed oil, to supply appellant with the manufactured paint, and to render to respondent regular monthly accounts. The parties were to settle by bills at four months.

This arrangement was carried on for about two years, when the respondent was led to believe that the company, appellant, had not, and was not carrying out its bargain; that it had not accounted monthly; that it had adulterated the paint so as to injure seriously the value of respondent's trade-mark, and he prayed that the company, appellant, might be enjoined not to use any longer respondent's trade-mark, to remove it from all packages of adulterated paint, and that the company, appellant, should also be obliged to furnish an account or pay the balance due, amounting to \$1,000, and also damages to the amount of \$5,000.

The appellant, in effect, admitted the contract, but said they had received further directions from respondent, directing them to "mix together certain ingredients by him named, in certain proportions by him indicated, with the view of producing the said green, or an article similar thereto, which said directions of plaintiff were minutely followed," and alleged an account had been rendered by which it appeared that the company owed respondent \$72.24, and that the respondent owed the company \$127.50; that the company had not used the trade-mark since respondent's protest, and offering to give up any paint they might have on payment of cost of manufacture. The company prayed further compen-

sation of \$72.24 by so much of \$127.50, and dismissal of the action.

There was also a *défense en fait*.

The Court below found that the company had failed to make monthly returns; that the company did adulterate and sell inferior paint, with respondent's trade-mark; that the company owed respondent a royalty of \$72.24; that the respondent owed the company \$110.52; that it was not satisfactorily proved that the green was adulterated by directions of the respondent. The judgment was rendered in conformity with these conclusions.

The pleadings admit some adulteration, if not to the extent pretended by respondent, and therefore the first question is to enquire whether there is any legal evidence of the alteration of the contract. By the judgment appealed from, the Court specifically rejects the evidence of Samuel Woods, to the effect that the green was adulterated by the directions of plaintiff. This decision appears to me to be correct. If we take it and the French rule of evidence, verbal evidence is not evidence to vary the terms of the contract if the instructions be looked upon as a contract, and, at any rate, verbal evidence is not admissible to vary the instructions without a *commencement de preuve par écrit*. If we look at it under the English law of evidence, the conditions of a contract cannot be altered by parole evidence, without a consideration. Under no rational system could it be tolerated to allow a party to avoid a contract in writing in his own favour by simply saying, "the contract is as you stated, but you told me I might give you an inferior article."

But Mr. Wood's evidence goes beyond the question of adulteration by direction of plaintiff. He admits the adulteration, and says he does not doubt that it was carried to the extent disclosed by the analysis of Dr. Girdwood.

On referring to the plaintiff's exhibit paper 27 of the record, it will be found that the adulteration is from about 22 to 24 parts of the cheaper material, leaving out the calculation as to the oil, the admixture of which was legitimate whatever its value. In other words, there ought only to have been 48.7 parts of sulphate of barytes to 109.5 of the paint as ground in oil, while in reality there were 71.3 parts to 100. It is admitted on all hands that this diminishes the value and the cost of the paint, and that it has damaged the standing of the paint, and for all this the Court, without entering into the question of the smaller value from which it does not appear plaintiff suffered, but treating the whole thing as damages, allowed the plaintiff \$250. I see no reason to change this judgment, and I would dismiss the appeal with costs, and also the cross appeal with costs.

Judgment confirmed.

Beique & McGoun for Appellant.
Robertson & Fleet for Respondent.

The Legal News.

VOL. VI. NOVEMBER 3, 1883. No. 44.

CIVIL RIGHTS IN THE UNITED STATES.

The Supreme Court of the United States, on Monday, Oct. 22, delivered judgment, by a majority of eight to one, on an important question of civil rights. The following is a summary of the points held by the Court :—

First—That Congress had no constitutional authority to pass the sections in question under either the thirteenth or fourteenth amendment to the constitution.

Second—That the fourteenth amendment is prohibitory upon the states only, and that legislation authorized to be adopted by Congress for enforcing that amendment is not direct legislation on matters respecting which states are prohibited from making or enforcing certain laws, or ordaining certain acts, but is corrective legislation, necessary or proper for counteracting or redressing the effect of such laws or acts; that in forbidding the states, for example, to deprive any person of life, liberty or property without due process of law, and giving Congress power to enforce the prohibition, it was not intended to give Congress the power to provide for due process of law for the protection of life, liberty and property, (which would embrace almost all subjects of legislation), but to provide modes of redress for counteracting the operation and effect of State laws obnoxious to the prohibition.

Third—That the thirteenth amendment gives no power to Congress to pass the sections referred to, because that amendment relates only to slavery and involuntary servitude, which it abolishes and gives Congress power to pass laws for its enforcement; that this power only extends to the subject-matter of the amendment itself, namely, slavery and involuntary servitude and necessary incidents and consequences of these conditions; that it has nothing to do with different races or colors, but only refers to slavery, the legal equality of different races and classes of citizens being provided for in the fourteenth amendment, which prohibits States from doing anything to interfere with such equality; that it is not an infringement of the thirteenth amendment to refuse to any person equal accommodations and privileges in an inn or place of public entertainment, however it may be violative of his legal rights; that it im-

poses upon him no badge of slavery or involuntary servitude, which imply some sort of subjection of one person to another, and the incapacity incident thereto, such as inability to hold property, to make contracts, to be parties in court, etc., and that if the original civil rights act, which abolished these incapacities, might be supported by the thirteenth amendment, it does not, therefore, follow that the act of 1875 can be supported by it.

Fourth—That this decision affects only the validity of the law in states and not in territories or in the District of Columbia, where the legislative power of Congress is unlimited; and it does not undertake to decide what Congress might or might not do under the power to regulate commerce with foreign nations, and among the several states, the law not being drawn with any such view.

Fifth—That, therefore, it is the opinion of the Court that the first and second sections of the act of Congress of March 1, 1875, entitled, "An act to protect all citizens in their civil and legal rights," are unconstitutional and void, and judgment should be rendered upon the indictments accordingly.

REFUSING A VERDICT.

We noticed lately a case, in British Columbia, in which the jury acquitted the prisoner in spite of the presiding Chief Justice's direction. We now find another case which was tried at Toronto on Friday, October 26, before Mr. Justice Galt, in which the jury wished to convict of murder, notwithstanding the Judge's instruction that the charge of murder had not been established. It was the case of Charles Andrews, indicted for the murder of one Moroney. It appeared that in a scuffle Andrews fired a shot which took fatal effect upon Moroney, but there was nothing to indicate premeditation. The jury, after being absent about an hour and a quarter returned with a verdict of "guilty of wilful murder," with a recommendation to mercy. We take from the *Mail* the following account of what ensued :—

There was complete silence in the court room, which was broken by his Lordship saying :—

"I wish you would reconsider that a little, gentlemen. Have you taken into consideration the assault made on that man (prisoner) before the affair?"

The FOREMAN—That is where the recommendation to mercy comes in, my Lord.

The JUDGE—I wish you would retire and reconsider the thing.

Mr. BRITTON, (the Crown Prosecutor)—No, my Lord, I submit that the evidence warrants their finding.

The JUDGE—No, no.

A JURYMEN—There appears to be a slight difference

of opinion among us with regard to the weight that attaches to malice aforethought.

The JUDGE—That is the whole crime, gentlemen.

The same JURYMAN—There are quite a number of us who are of opinion that there could be no malice in the matter. We were all agreed on that point as far as regarded malice, but we considered that the evidence entitled us to bring in this verdict.

The JUDGE—That won't do, gentlemen. You must retire and reconsider the verdict. The law says if a person designedly uses a weapon which is calculated to take life, that would be murder; but the law also says this: That when two persons are fighting together, and one of them uses a weapon by which the life of the other is forfeited—unless one of them did it premeditatedly, and not on the spur of the moment—he would be guilty of manslaughter, and not murder. You had better retire, gentlemen, I could not accept that verdict.

The jury again retired, but were immediately recalled, and his Lordship said that if their recommendation was based on the point that they doubted whether or not there was malice, they should bring in a verdict of manslaughter. If they persisted in the verdict of wilful murder he would be compelled not to accept it, but would consult his brother Judges regarding it.

After being absent half an hour the jury returned with a verdict of "Manslaughter."

THE GOVERNOR GENERAL.

An *Extra* of the *Canada Gazette*, of date Oct. 23, says:—

On this day, at nine o'clock in the forenoon, His Excellency the Most Honourable Henry Charles Keith Petty-Fitzmaurice, Marquis of Lansdowne, in the County of Somerset, Earl of Wycombe, in the County of Bucks, Viscount Cain and Calnstone in the County of Wilts, and Lord Wycombe, Baron of Chipping Wycombe in the County of Bucks, in the Peerage of Great Britain; Earl of Kerry and Earl of Shelburne, Viscount Clanmaurice and Fitzmaurice, Baron of Kerry, Lixnaw, and Dunkerron, in the Peerage of Ireland, proceeded to the Chamber of the House of Assembly, of the Province of Quebec, in the City of Quebec.

His Excellency having been by Commission under the Royal Sign Manual and Signet, dated at *Osborne House*, Isle of Wight, on the 18th day of August last, constituted and appointed by Her Majesty, Governor General in and over Her Dominion of Canada, took the prescribed oaths before the Honourable Sir William Johnston Ritchie, Knight, Chief Justice of the Supreme Court of Canada, a Court of Record of Her Majesty in Canada, by whom they were tendered and administered to His Excellency.

The same *Extra* contains the following appointments by His Excellency:—

Major the Viscount Melgund, to be Secretary and Military Secretary to the Governor General of Canada.
Lieutenant Henry Streatfield, Grenadier Guards, to be Aide-de-Camp.

Lieutenant, the Honourable Henry James Anson, Highland Light Infantry, to be Aide-de-Camp.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, October 31, 1883

Before JOHNSON, J.

LAWRENCE V. RYAN.

Goods seized by Customs Officers—Notice of Claim—40 Vic. c. 10, s. 111.

Where goods are seized by the Customs authorities, and the owners wish to claim them, notice in writing of claim must be given within one month from the day of seizure.

PER CURIAM. The defendant is collector of customs at this port, and the plaintiff sues him as such, giving the month's notice of action required in cases against public officers.

The declaration avers that about the 28th of December last two books, one being the philosophical works of Voltaire and the other Paine's "Age of Reason," were entered in the Custom House as the plaintiff's property, and for the purpose of allowing the defendant to levy on them such duty as the law directs. That the defendant illegally refused to deliver them, though the proper Customs duties were duly offered, and that he still illegally keeps them. Then, there is an allegation that the defendant has injured the plaintiff in the eyes of the public by creating an impression that he was importing immoral and indecent books, and has thereby caused him damage to the extent of \$102. That the books in question are not immoral or indecent; and the conclusion is that "the said defendant be adjudged and condemned to deliver to the plaintiff the said two books within fifteen days from the date of the judgment, upon payment and tender by the plaintiff of the dues and Customs duties on the same, and that the defendant be also condemned to pay a sum of fifty dollars to plaintiff, for the illegal detention of the said books, and for damages suffered as aforesaid; and that in default of the said defendant delivering over said books within said delay, he be condemned to pay and satisfy unto plaintiff the sum of one hundred and two dollars, with interest and costs."

There is confusion in this declaration. First, it says that the plaintiff has suffered \$102 damages by being supposed, in consequence of the defendant's illegal conduct, to have imported

indecent books. If that had stood alone, and those damages for injury to character merely had been prayed in the conclusion, the Court would of course have known how to deal with the case: the action would then have been one for injury to character by certain means alleged, and nothing more; but I have to deal not so much with what a party says—though, of course, that is always important—as with what he asks, for that is what we have to grant or to refuse according to the facts and to the law in the particular case. Now what he asks here in the prayer or conclusion of his declaration is that the books should be delivered to him, and also that a sum of fifty dollars should be paid to him for their illegal detention—a sum not giving jurisdiction here—and no value being put upon the books themselves; and then he asks that the defendant, in default of restoring the books, should be made to pay \$102 damages; so that it is certain that the books themselves are claimed by the action, although their pecuniary value has been omitted to be claimed; and the only damages asked within the jurisdiction of this Court are undoubtedly prayed as the alternative for the books themselves not being restored.

The defendant pleaded, 1st, a demurrer, which was dismissed, 2ndly, he pleaded by exception, that he had seized and taken the books on the 28th December, as forfeited, under the Customs laws, and the plaintiff never gave any notice in writing to the defendant, the seizing officer or other chief officer of Customs, within one month from the day of seizure as required by law, that he claimed, or intended to claim them; whereby they became condemned absolutely, and without suit or proceeding of any kind, at the expiration of one month from their seizure. A third plea set up the insufficiency of the notice of action, and also a variance between the grounds stated in the action and those stated in the notice. The fourth plea was that no regular or lawful entry of these goods had ever been made; that the duty chargeable on them was 15 per cent, *ad valorem*, and was never even offered, and consequently they were taken to the warehouse, and kept at the risk and charge of the owner, and no entry having been made of them within one month they became subject to be sold. By his fifth plea the defendant alleged that these books were of an immoral and indecent character, and were prohibited by law

from being imported into this Province, and were lawfully detained, and became forfeited without process.

There were, therefore, several questions put before the Court; 1st, the demurrer having been disposed of, the same point was more properly raised by the first exception, viz., that the books being detained and seized as prohibited, became forfeited and condemned without suit, in the absence of a notice of claim within a month, under the one hundred and eleventh section of the Customs Act (40 Vic., c. 10).

I say nothing now as to whether the demurrer ought to have been dismissed or not. I have merely to deal with the exception, and I am quite clear that, whether the point, depending as it did upon allegations of fact, (and that would appear to have been the ground of the decision) was cognizable under a demurrer or not, it must be passed upon now, for this exception alleges as matter of fact that the books were detained as forfeited, and there was no notice of claim given. The words of the 111th section are, "All vessels, vehicles, goods and other things seized as forfeited under this act or any other law relating to Customs, or to trade or navigation, shall be placed in the custody of the nearest collector, and shall be deemed and taken to be condemned, without suit, information or proceedings of any kind, and may be sold," &c. &c., &c., "unless the person from whom they were seized, or the owner thereof, or some person on his behalf do, within one month from the day of seizure, give notice in writing to the seizing officer, or other chief officer of the Customs at the nearest port, that he claims or intends to claim the same; and the burden of proof that such notice was duly given in any case shall always lie upon such owner." Therefore this exception will be well founded, if these facts are true—viz., that there was a seizure, and a condemnation without any necessity of process, and if there has been no notice of claim—which the plaintiff has to show the giving of. Now both of these facts are incontestable. The proof is that no entry was ever made, because the examining officer took the books at once to the collector who refused to allow them to be entered, and ordered them to be detained, as clearly appears by the evidence of Mr. O'Hara. The provision of law which the defendant in-

vokes is a very old one in the Customs laws, and I have always seen it acted upon, and I particularly asked the defendant's counsel at the hearing whether he insisted upon it, and his explicit answer was that his instructions did not allow him to do otherwise. Therefore there has been some time spent in vain upon a discussion which took a very wide range under the pretensions set up by the fifth plea, and on which I am not now permitted to enter; and my duty is to dismiss the action under the defendant's first exception. This may be somewhat disappointing; but it cannot, of course, be a surprise. I am aware that the learned counsel for the defendant accompanied his statement that he insisted on his exception by expressing a hope that I might reach the merits. This either meant that he might see his way to withdraw his pretensions under the exception, or it did not. The exception has not been withdrawn; but it remains, and, of course, must be decided. I have fully considered all that the plaintiff's counsel said, both at the hearing and in his *factum* since sent up; but he will, I think, see at once that the notice of action is quite a different thing from what is required by the 111th section. The first is required by law in all cases as a protection to public officers acting as such. The second is peculiar to the laws of the Customs, and makes seizures of this sort final, without suit or process of any kind, unless the claimant of the goods gives notice in writing within one month from the date of seizure, as a prerequisite to his right of action; nor, on any other ground that I can see, can the notice of action be possibly confounded with the notice of claim under section 111, for the latter notice must be given within a month, and the notice of action here was only given long afterwards. The only way of getting over the omission to give the notice of claim would have been for the collector to consent to a bond under the subsection 2 of 111. It cannot be doubted, after reading the statute, that the officer of Customs has power—a very extensive, but probably a necessary power—to detain as forfeited anything imported which he may deem prohibited by law. Of course he does this at his own risk, if the thing seized should turn out not to be prohibited; but the only way of trying his right, where the action, as here, is to get the

goods restored, and to get damages only in case of their not being restored, is to give the notice under section 111, otherwise the goods must, to use the very words of the statute, be deemed and taken to be condemned absolutely and without any proceeding or formality whatever—a result of law with which the plaintiff's right to get them back without the notice of claim cannot co-exist. I caught from an expression used by the plaintiff's counsel that his idea was possibly that the seizure under the circumstances would only give the officer the right to sell; and that the defendant does not plead that he has sold these books; but that can make no difference; for, of course, if the power is given, it can and may be exercised (whether it has or not is immaterial), for it never could be exercised at all if the plaintiff had a co-existing right to get the goods back without giving the notice.

The result of this ruling is to put the plaintiff out of court, and it is of course impossible to proceed to adjudicate upon the merits of a case no longer *sub judice*. If the defendant's counsel, however, meant to invite my opinion as to whether the books in question are prohibited by law as immoral or indecent, an opinion which now can have no legal effect upon the case, I must decline to exercise my office uselessly and without authority.

Action dismissed with costs, under defendant's first exception.

Doutre & Co. for plaintiff.

H. Abbott, Jr., for defendant.

COURT OF QUEEN'S BENCH.

MONTREAL, September 19, 1883.

DORION, C.J., MONK, RAMSAY, CROSS and BABY, JJ.
CHAVIGNY DE LA CHEVROTIÈRE (plff. below),
Appellant, & THE CITY OF MONTREAL (deflt. below), Respondent.

Public Thoroughfare—Prescription by ten years' open and uninterrupted use.

Where land was given to the City of Montreal to be used as a public market, and the City, long after, converted it into a public thoroughfare, and registered the same in the register of public streets and squares: held, that the donors were not entitled after the lapse of ten years, to claim the rescission of the donation on the ground of such conversion.

The action of the appellant in the court below claimed the rescission of a deed of do-

nation made in 1803 of the property in the city of Montreal known as Jacques Cartier Square.

It appears that in the year 1803 the property now called Jacques Cartier Square, was a garden belonging to the Fabrique of Montreal. The Fabrique decided to sell it, and a committee was appointed to divide it and dispose of it in such manner as should appear most advantageous. Two of the members, Durocher and Perinault, became the purchasers for the sum of £3,500, but the same day they disposed of the property in lots at an advance of £800, to a number of persons who acquired their lots with the stipulation that the central portion should be reserved as a public market. The deeds carrying out this arrangement were completed on the 26th and 27th of the same month (December, 1803). The vendors, Durocher and Perinault, in order to conform to the condition that the central space should be a public market, made application to the justices of the peace then in charge of the city affairs, and by a deed of date 29th December, 1803, they ceded to the city the land in question to be used as a public market, stipulating that if the land were at any time applied to other uses the deed should be considered null and void. The square was thenceforward occupied as a market for more than forty years. A market house stood in the middle, with a street on each side, namely, Fabrique street on one side and St. Charles street on the other. Meantime changes took place in the city government. A city council succeeded to the charge which formerly devolved on magistrates, and in 1846 the old market place was abolished, a more spacious market being erected elsewhere, and the old site was turned into a public square. But in 1858 the concourse at the new Bonsecours Market was so great that Jacques Cartier square was again used as a market for grain.

The present proceeding was instituted in 1876 by the appellant, alleging that he represents the original proprietors, Durocher and Perinault, and complaining that the condition of their donation to the city, namely that the ground should be used as a public market, has not been complied with, and therefore the deed should be annulled, and the land should revert to the plaintiff.

Several grounds of defence were set up by the city. It was alleged that the object of Duro-

cher and Perinard was merely to discharge the obligation they had assumed towards the parties who bought their lots, and the latter had never complained of the change from a market to a square. The city had a possession of 73 years, and the plaintiff had never complained, and the present action was a purely speculative proceeding. It was also pleaded that the square had existed for more than ten years, and had been registered in the register of streets, and was now public property. Subsequently, the defendants filed an additional plea, alleging that Jacques Cartier Square had been converted into a grain market, so that the original condition was fulfilled.

The Superior Court dismissed the action, the grounds being in substance as follows: 1st. The condition as to cancellation of the donation in the event of the property being converted to other uses was held to be a penal clause. 2nd. It was proved that part of the land had been used since 1803 as a public street. 3rd. The persons from whom the plaintiff derived his rights had ceded all the adjoining properties more than fifty years ago; that they would not be troubled in respect thereof, and the plaintiff was without interest in bringing the suit. 4th. The land in question was now actually used for the purpose of a public market.

Lacoste, Q.C., for the appellant, contended that the grounds upon which the judgment was based were untenable. These grounds are, first, that the clause in the original donation by which the land was to revert to the donors if applied to other purposes was comminatory; secondly, that the appellant was without interest to complain; and thirdly, that the donee was in time up to the rendering of the judgment, to re-establish the market, which had been done. In coming to the consideration of the case, it might be observed that the appellant was in the rights of the donors as heir as well as transferee. It was admitted by the city that the destination of the ground had been changed for a period less than 30 years before the suit. The pretension of the appellant was that the moment the respondent declared (as it did in 1847) that the land was to be turned to a different use, the city ceased to be proprietor, and the rights of the parties were the same as before the deed of 1803. This deed was drawn with great care; the object for which the land

was given to the city was explicitly stated; and there was a reservation in the plainest and strongest language that could be employed, that the donors should re-enter into possession *de plein droit*, if the land was converted to any use other than a public market. This was not a comminatory clause, but a right expressly stipulated in a deed of donation. It is undoubted that donors may attach to their donations such conditions as they think proper, provided they be not contrary to law, public order, or good morals. Here the stipulation was perfectly legitimate, and the city had recognized its validity by re-establishing the market in Jacques Cartier Square when the present suit was served. It was submitted, however, that this did not affect the rights of the appellant to avail himself of the clause, and to be declared proprietor. The second ground of the judgment was that the appellant had no interest, as his *auteurs* had sold, more than 50 years ago, all the land which they owned adjoining that donated in 1803; that there is no fear of *trouble* on account of the conversion of the property into a public square. This ground would apply only if the fulfilment of the condition was demanded, but the appellant simply asked for the resolution of the deed of donation. Moreover, the donee has no right to inquire into the motive or interest which the donor has in the fulfilment of the condition. He had a right to impose it, and if it is not fulfilled, the donation becomes void. Further, the interest of the appellant was that by the default of the city, the property reverted to him. It was his part to watch over the fulfilment of the condition, as the resiliation of the gift was dependent on the faithful carrying out of the stipulation. The last ground assigned in the judgment was that the city could at any time re-instate the market, and the fact that it had done so after the institution of the suit was sufficient for its protection. This appears to the appellant an extraordinary proposition, because the donation became null the moment the use of the ground was changed. Besides, the appellant submitted that a market had not been regularly established in the square, and that the Corporation had made a mere pretence of complying with the conditions.

Roy, Q.C., for the respondent, submitted that there was no ground for the present litigation.

The donors were under the obligation to obtain the establishment of a market on the site, and it was to acquit themselves of this obligation that they induced the city to have the market there. The condition was to establish a market, and the moment a market was put there the donors were relieved from all liability to the purchasers of lots, and the market fell under the ordinary rules of the municipal authority. There was no obligation to erect a building, but merely to level the ground. The Corporation, in 1847, when the market was removed, had full power to change the site. The recourse of those interested was not to claim the property back, but to recover damages for the loss occasioned by the change. Another ground on which the Corporation relied was that under existing legislation, any street or public square possessed by the city during ten years and entered on the register of streets becomes the property of the Corporation. The ground claimed had been possessed for more than ten years, and had been registered as a public square. It was too late for the appellant to complain now. It was also urged that the appellant did not stand before the Court in a favourable light. He had obtained transfers of rights from other parties, knowing that he was buying a law suit.

RAMSAY, J.—Action by appellant to be declared proprietor of $\frac{1}{33\frac{1}{3}}$ undivided parts of a certain piece of land situate in the city of Montreal, and known as the Place Jacques Cartier. The appellant in his declaration, in fact, sets up that his *auteurs*, Joseph Perinault and Jean Baptiste Durocher, by deed of donation of the 29th December, 1803, gave to the *auteurs* of the Corporation respondent the land in question, subject to the following stipulations and reserves:

"Pour établir et servir de place publique de
" *marché* en cette ville, sans pouvoir être diverti
" ni employé à d'autres fins; pourtout le dit
" terrain servir à toujours de place publique de
" *marché* public, ... avec réserve pour
" les donateurs, leurs hoirs et ayant cause à l'ave-
" nir, du droit de canal qui est fait sur une
" partie du dit terrain, et de faire sur icelui tels
" canaux dont ils pourraient avoir besoin. * * *

"Comme aussi de rentrer de plein droit en
" la propriété et possession du dit terrain, si on

"voulait la convertir à d'autres usages qu'une place de marché public."

That a market was established on the property. That in 1847 it was demolished, in virtue of a by-law of the Corporation, and the ground turned into a public street, and that it has ever since been so used, and that, therefore, he has a right to resume possession of the property so given.

This action was met by several pleas, which, after amendment, in effect stand thus :

1st. That the object of the donors, in making this stipulation, was to give value to property of theirs adjacent to this intended market. That the market, having been established, and while it was so established, appellant's *auteurs* sold, at a profit, their adjacent property, and are not *troubés* by the conversion of the market into a public road or square.

2nd. That the Corporation in converting it into a public square, acted in virtue of powers conferred by 8 Vic., c. 59, and that, therefore, appellant cannot complain, or, if he has any claim, it is for damages.

3rd. That respondent had been in possession for 73 years, and that the Corporation had a right to use the land as they thought fit, and they had used the ground for public purposes, it having become inadequate to serve as a market.

3. *Acquiescement* by appellant.

4. More than ten years have elapsed since it was made a street, and was as such duly registered in the corporation books.

5. Appellant's rights are litigious rights.

The learned judge in the court below held, that a portion of the property had from the first been a public street, that the clause was *comminatoire*, that appellant, having sold all his property, had no interest in exacting its fulfilment, and that it still could be fulfilled; and he therefore dismissed the action.

It appears to me that several of these pretensions may be dismissed without much difficulty. I particularly refer to the third and last proposition as grouped above. I cannot see that the Corporation, more than any other person, could prescribe against its title, and so if this was a reservation not prohibited by law, 73 years' possession could no more than one year give them rights beyond their title.

Again, as to what are litigious rights, there

may often be some difficulty under our law, for we have not adopted the simple rule of the Code Napoleon, Art. 1700. But in this case there can be no difficulty, for appellant is a co-proprietor. (4 Toullier, No. 488.)

I cannot concur with the learned judge in the court below in considering that this clause, even if *comminatoire*, affects appellant's pretensions. The answer of the respondent is not "the Corporation is willing, in such delay as is mentioned, to re-establish the market," but that appellant has no right. Nor do I consider we can make up by conjectures from the testimony what were likely to be the motives of appellant's *auteurs*, unexpressed in the deed. It would be to prove *outré le contenu de l'acte*, and to wander into a perfectly imaginary field of speculation. To all intents and purposes, this deed is a pure donation, and we have nothing to do with whether the donors gave the land in the hope of gain, or of the glory which attaches, sometimes, to the memory of public benefactors.

On the other points, I am with respondent. It seems to me that the Corporation had generally the right to transfer a market from one place to another, and they certainly had a right at common law to open a street on their own property. By other statutes, they had a right to expropriate. There was no need to expropriate when they were in possession as owners. Under these circumstances, the donor saw a great public improvement going on and accomplished, and he remained perfectly silent for nearly thirty years. Then, almost as prescription was acquired, he turns on the Corporation, a public body, to stop up a great public thoroughfare and hand it back to him. The results of a proceeding of this kind should have warned the appellant that such a pretension is untenable in law, the rule of which is perfectly clear. We laid it down in the case of *Guy & The Corporation of Montreal*.^{*} If a person unmistakably abandons to the use of the public any real property, so that rights are acquired upon it by the public, he cannot resume its possession as against them. The Corporation of Montreal as a public corporation, that is, one on which certain governmental powers are conferred, represents this public right, and it cannot be compelled to do that which would only lead to individual contests with the public. The abandonment by the

^{*} 3 L. N. 402.

corporation of Jacques Cartier Square, the annulling of the deed of donation, would not determine the right of each person who desired to pass that way; and as the corporation holds not only by its deed of donation but by its representative character, it appears to me manifest that this action cannot be maintained. It is possible that there may be an action of damages against the corporation, but this question is not before us on this appeal, and I have no opinion to express upon it. I am to confirm.

Judgment confirmed.

Lacoste, Globensky & Bisailon, for Appellant.

R. Roy, Q.C., for the Respondent.

THE CASE OF BETTY JOHN.

From a scarce and singular volume by W. Hutton, containing decisions of the Court of Requests at Birmingham, we extract the following unique case for the entertainment of our readers:—

A plaintiff wished to sue a person in this court, but, not knowing whether the party was male or female, was at a loss by what name to begin. The defendant had been many years known in Birmingham, in the dress and character of a woman called Elizabeth, and had been many years known in the dress and character of a man, who answered to the name of John. The plaintiff after fruitless inquiries, determined to trap the person, let the sex be what it would, and, therefore, filled up the summons with *Elizabeth alias John Haywood*.

Whatever was the gender, the animal appeared in court in a female habit, was rather elegant, of a moderate size, tolerably handsome, about thirty-two, had a firm countenance, and manly step, no beard, eyes susceptible of love, a voice tending to the masculine, with manners engaging, and was rather sensible. A husband was pleaded in bar, and that the court had no power over a wife. The trial continued three or four days, during which the defendant acquired the appellation from the people of *Betty John*. As it attended the court in female dress, I shall take the liberty of treating it with a feminine epithet.

It appeared, from undoubted evidence, that, while she dressed like a man, she was suspected to be a woman; but in both dresses was

strongly suspected to be a man. The common opinion of the ignorant was that she was an hermaphrodite, partaking of both sexes. When she carried a male dress, she spent her evenings at the public house with her male companions, and could, like them, swear with a tolerable grace, get drunk, smoke tobacco, kiss the girls, and now and then kick a bully. Though she pleaded being a wife, she had really been a husband, for she courted a young woman, married her, and they lived together in wedlock till the young woman died, which was some years after and without issue. She afterwards, like people of higher rank, kept a mistress, and ran away with her.

Forcible evidences like these were sufficient to convince the wisest head upon this bench, or any other, that a man in disguise stood before them. Her wife living peaceably with her all her days without one complaint of a breach of the marriage covenant, evinced there was no defect. Neither would a girl sacrifice her reputation by becoming a mistress to a woman in breeches. Besides, a woman receives very little more pleasure in saluting a living woman than a dead one; whereas, a man, like the figure before the bench, seemed to receive a pleasure inexpressible. Her being versed in the art of kicking further proved she was a man, because it is an art never thoroughly understood by the beautiful part of creation, nor has it been practiced since the days of Queen Elizabeth. Again, she spoke but little, which was no indication of her being a woman.

The court, not satisfied she was a wife, and no further evidence arising, entered an order against her. On her neglecting payment she was served with an execution, and committed to prison. Two days after, it appeared from incontestible proof that she was a real woman, and a real wife.—*Soule & Bugbee's Legal Bibliography*.

APPOINTMENTS.—The following appointments have been gasetted:—John Anderson Ardagh, junior judge of the county court of the County of Simcoe, to be judge of the same court, *vice* James Robert Gowan resigned; Hon: M. W. T. Drake, and A. E. B. Davis, of Victoria, B. C., to be Queen's Counsel; Right Hon. Sir J. A. Macdonald, K. C. B., to be President of the Queen's Privy Council for Canada, and Superintendent General of Indian affairs; Hon D. L. Macpherson to be Minister of the Interior; Hon. Wm. Miller to be Speaker of the Senate of Canada.

The Legal News.

VOL. VI. NOVEMBER 10, 1883. No. 45.

STAMP DUTIES IN MANITOBA.

A letter from Winnipeg complains bitterly of the heavy stamp duties collected on legal proceedings in Manitoba, and says that when the news of the decision of the Supreme Court in *Loranger & Reed* (8 L. N. 209) arrived, to the effect that the imposition of any such stamp tax was indirect taxation on the part of a province, and so under the Confederation Act *ultra vires*, there seemed "to be balm in Gilead and joy in the tents of the lawyers." The question was forthwith raised by refusing to stamp jury notices for the coming assizes. Judge Dubuc, in chambers, decided that the practice of the Court must be adhered to, but it is said that the question will shortly be brought before the full bench.

DEFENCE TO LIBEL SUITS.

In *Farmer v. Millman*, the plaintiff, a Hamilton photographer, is suing one Millman and the *Hamilton Tribune*, for damages for libel. The alleged libel is contained in an article in the paper mentioned, charging the plaintiff with having seduced a girl named Bella Payne, who has since died from the effects of her betrayal. The *Tribune*, as one defence to the action, sets up that the article was published by them *bona fide* and in the discharge of their duty as public journalists. To this defence the plaintiff took objection, and moved (Oct. 23) before Chief Justice Wilson at Toronto, to have it struck out, on the ground that it is no answer to the action unless it shows in what way it is in the public interest to publish it. Counsel for the *Tribune* contended that that was a question of fact, and should be left to the trial, or that particulars could be given under the defence, but the plea should not be struck out. The learned judge, however, held that where a newspaper sets up such a defence to an action of libel it should show in what way the subject matter of the article is of public interest. Judgment on the motion was therefore against the *Tribune*, but leave was given to amend on payment of costs.

SALE OF GOOD WILL.

A case came up recently before the Supreme Court of Louisiana (*Bergamini v. Bastian*, 16 Rep. 460), in which the question was very much like that decided by our Court of Queen's Bench in *Findlay & McWilliam*, 23 L. C. J. 148, but the Louisiana Court appears to have arrived at a different conclusion. The question was recognized to be a new one in Louisiana, and the Court, therefore, gave unusual care to its decision. The holding was that the sale of a commercial establishment, together with the good will thereof, does not preclude the vendor from the right of opening a similar establishment in the same vicinity within a short time after the sale, in the absence of an express understanding or stipulation to the contrary. The following extract from the opinion of the Court shows the grounds on which the judgment rested:—

"Plaintiff contends that the legal obligation of the vendor to warrant the peaceable possession and enjoyment of the good-will necessarily implies the obligation not to enter into a similar line of business at a short distance from the other, calculated to draw customers from the concern which he had sold and warranted. This construction is resisted by the defendant, who urges that the vendor, under such circumstances, will not be held to have thus contracted not to enter into a similar business, in the absence of an express stipulation to that effect, and that a contract in restraint of trade cannot be presumed and enforced by the courts. The issue thus presented has not yet been the subject of inquiry in our jurisprudence, and it therefore presents a new question, of serious importance to commerce, to the solution of which we have bestowed unusual care, thought, and study. The three cases quoted from our reports do not involve the present issue, but the principles therein settled afford some assistance in our present researches, and throw some light on the subject of this controversy. They settle the principle that good-will can be the subject of a sale in commercial contracts, and that the clause in an act of sale by which the vendor binds himself not to pursue the same trade or business as that which he sells, within a specified time, is not invalid as being in restraint of trade, and can be enforced by the courts. Such was the issue presented, and such was the

adjudication made, in the cases of *Wintz v. Vogt*, 3 La. Ann. 16, and *Verges v. Forshee*, 9 id. 294. The decision in the case of the *Succession of Jean Journé*, 21 id. 391, defined the meaning in law of the term 'good-will,' and re-affirmed the doctrine that it was a legal subject of trade, and bargain and sale. The term has been defined by several authors whose definitions, although varied in terms, all approximate to the same meaning. The following definition by Judge Story commends itself for its clearness and vast comprehension: 'Good-will is the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or other property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.' By the French authorities it is known as '*achalandage*.' A careful examination of the authorities under both systems has disclosed to our minds the fact, that on the point which we are now discussing there is no material difference between the decisions of the civil law and of the common law courts. The shade of difference between the two lines of authorities is on the question of the binding effect of contracts under which a party stipulates not to pursue a particular line of business, on which point the common-law authorities have a tendency to discountenance such contracts as in restraint of trade, and as tending to foster dangerous monopolies, while the civil-law authorities seem to tend toward the binding effect of all such contracts or stipulations. But on the proposition which we maintain in this opinion, that the vendor of an establishment, with the good-will, does not preclude himself from resuming business in the same line, in the same place or vicinity, and a short time after the sale, in the absence of an express understanding or stipulation to that effect, we find ample support from decisions and respectable authorities under both systems. *Cruikwell v. Lye*, 17 Ves. 335; *Bassett v. Percival*, 5 Allen, 345."

In the case of *Finlay & McWilliam*, cited above, the grounds of action were somewhat stronger. The retiring partner not only opened

a similar business in the immediate vicinity, but he sent circulars to the customers of the firm of which he had been a member, with the object of creating the impression that he had succeeded to the firm's business. Our court held, and it seems to us very reasonably held, that the sale of the good-will implied the obligation on the part of the vendor to make no undue competition with the vendee, and that the acts of the vendor in seeking to convey to the public the impression that he was the successor to the business were in violation of good faith.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, October 17, 1883.

Befor. LORANGER, J.

In re Hon. J. A. MOUSSEAU, Petitioner.

Quebec Elections Act—Recount of votes.

Where the deputy returning officer has omitted to make a statement of the votes given to each candidate (under sect. 193 of 38 Vict. cap. 7), it is the duty of the returning officer to ascertain by reference to the documents the total number of votes for each candidate at the poll in question, and if the returning officer has failed to do so, a recount may be ordered by the Judge.

PRESIDIUM. Il s'agit du recompte des suffrages donnés dans l'élection tenue dans le district électoral de Jacques-Cartier le 26 septembre dernier. Il appert par la requête que le 13 octobre courant, l'officier aurait procédé à l'ouverture des boîtes de scrutin, conformément à la section 200 de l'Acte Electoral de Québec, mais il n'aurait pu constater le nombre exact des votes enregistrés, attendu que quelques boîtes de scrutin ne contenaient pas les relevés voulus par la loi, tandis que les relevés trouvés dans certaines autres boîtes étaient irréguliers et incomplets, et n'indiquaient pas d'une manière exacte l'état de la votation. Il en serait résulté que la majorité du requérant, qui, s'il faut en croire les allégations de la requête, aurait été de plus de cent voix, suivant tous les rapports connus, aurait été réduite par le certificat de l'officier-rapporteur au chiffre de 42 votes.

Le requérant se plaint, en outre, que l'officier aurait négligé, pour s'enquérir du nombre exact des votes donnés, de consulter les documents et pièces justificatives qui se trouvaient dans les boîtes, n'ayant tenu compte, dans son addition, que des relevés qu'il avait trouvés dans les boîtes, tout incomplets qu'ils fussent. On lui reproche de n'avoir pas suppléé aux relevés manquant par la vérification des listes d'électeurs et des cahiers de votation et les autres documents qui, aux termes des sections 201 et 202, étaient suffisants pour le mettre en mesure de donner un état exact de la votation. Le requérant, se trouvant ainsi privé de la majorité réelle qu'il prétend avoir obtenue, demande le recompte des votes ; sa requête est accompagnée de l'affidavit de son agent.

On s'objecte à ce recompte, et comme moyen d'opposition, on invoque les termes mêmes du statut (42-43 Vic., ch. 15) qui autorise le recompte en matière d'élection, lequel n'aurait lieu suivant l'opposant que dans les deux cas suivants, savoir : *lorsqu'en comptant les suffrages, le sous-officier-rapporteur aurait improprement compté ou écarté quelques bulletins de votation, ou lorsqu'il a mal additionné les votes.* Or, dit l'opposant, le requérant ne se plaint ni de l'une ni de l'autre de ces erreurs ou irrégularités ; sa plainte se bornerait au fait que l'officier-rapporteur n'a pas fait un rapport définitif des votes enregistrés, attendu qu'il manquait des relevés du sous-officier-rapporteur, et que pour faire son addition, il n'a tenu compte que des relevés qu'il a trouvés dans les boîtes, sans s'enquérir aux autres sources d'informations qu'il avait en sa possession.

L'opposant prétend que la requête et l'affidavit ne couvrent aucun des cas prévus par le statut, et conséquemment que le juge est sans juridiction à connaître des matières énoncées dans la dite requête, lesquelles, suivant lui, pourraient tout au plus faire le sujet d'une pétition d'élection.

S'il faut en croire l'opposant et l'interprétation qu'il donne au statut, il n'y aurait de sujets à révision par le juge que le compte et l'état de votation certifié par le sous-officier-rapporteur ; celui de l'officier-rapporteur échapperait à sa juridiction.

La lettre de la loi, si on ne consulte que la version française, semble donner raison à l'opposant. Mais en lisant la version anglaise, on

trouve que les cas de révision y sont exprimés différemment, et l'officier-rapporteur y est désigné comme un des officiers dont le rapport est sujet à révision. En effet, ces deux officiers ont des devoirs et des attributions différentes à remplir, mais le concours des deux est nécessaire pour la constatation définitive et finale du nombre des votes enregistrés, ainsi que je le démontrerai dans un instant. Quel est l'objet du recompte et que veut la loi qui l'autorise, si ce n'est de réparer, au moyen d'une investigation scrupuleuse et minutieuse, faite sous l'autorité du juge, les erreurs ou les irrégularités commises par les officiers chargés du dépouillement du scrutin après la votation ? Que l'erreur soit le fait du sous-officier-rapporteur ou de l'officier-rapporteur lui-même, peu importe : l'objet que se propose la loi, c'est que le vote soit constaté d'une manière certaine et sommairement, au moyen des bulletins, relevés et de tous les autres documents qui ont servi à l'élection et que le sous-officier-rapporteur est obligé de déposer dans la boîte du scrutin.

Deux opérations sont nécessaires après la votation pour constater l'état des votes, et en cas d'insuffisance de l'une ou de l'autre, la loi en autorise une troisième, c'est celle du recompte par le juge. Les deux premières sont du ressort du sous-officier-rapporteur et de l'officier-rapporteur. Le sous-officier-rapporteur fait, immédiatement après la votation, le dépouillement du scrutin, et compte, en s'aidant des bulletins eux-mêmes, le nombre des suffrages donnés à chaque candidat, écartant les bulletins qui ne sont pas conformes à la loi ; fait un état de la votation et des bulletins écartés, et met le tout sous enveloppes ou dans des paquets scellés et distincts.

Le sous-officier-rapporteur prépare, en outre, un relevé indiquant le nombre des bulletins admis, des suffrages donnés à chaque candidat, des bulletins écartés, maculés et remis, et de ceux qui n'ont pas été employés, qu'il renvoie ; puis, après avoir pris une copie de ce relevé, il place l'original dans la boîte avec la liste des électeurs, au bas de laquelle il est obligé de certifier le nombre total des électeurs qui ont voté, le cahier de votation, les bulletins qui n'auraient pas servi, ainsi que toutes les autres pièces qui ont été employées ou requises à l'élection ; puis cette boîte est ensuite fermée à clef et scellée et remise à l'officier-rapporteur.

Le relevé doit être accompagné du serment du sous-officier-rapporteur et du greffier de l'élection, constatant que les formalités voulues par la loi ont été remplies.

Cette opération terminée, commence le rôle de l'officier-rapporteur; il doit faire la vérification de l'état du sous-officier-rapporteur, vérification qui sert de base au rapport officiel ou au certificat d'élection qu'il est obligé de donner.

Cette vérification se fait au moyen des relevés du sous-officier-rapporteur et des autres documents et pièces justificatives contenus dans la boîte, à l'exception des bulletins eux-mêmes, qu'il n'a pas le droit d'examiner; puis il délivre un certificat constatant l'état définitif de la votation.

Toutefois ce dernier rapport n'est pas final; en cas d'erreur, il y a appel au juge, qui reprend à son tour les états de compte de l'officier-rapporteur et du sous-officier-rapporteur, et rectifie finalement le tout par le recompte des bulletins restés sous enveloppe, dont seul il brise le sceau lui-même, en présence des parties.

Voilà le rouage tel que le donne le statut quant à ce qui concerne l'état des votes et la vérification qui doit en être faite pour en constater exactement le nombre.

Avant la passation de l'acte du recompte, la loi exigeait comme elle l'exige encore aujourd'hui, deux rapports sur l'état de la votation: celui du sous-officier-rapporteur et celui de l'officier-rapporteur, avec cette différence qu'alors, le rapport de l'officier-rapporteur était final, et sauf les cas de privilèges du ressort de la chambre d'Assemblée législative, ce rapport ne pouvait être contesté que par voie de pétition d'élection. Ces deux rapports sont encore de rigueur, et quelle serait l'utilité de la loi du recompte, si elle ne doit s'appliquer qu'à l'un d'eux, savoir celui du sous-officier-rapporteur? A quoi servirait la révision de ce dernier rapport, si celui de l'officier-rapporteur doit rester intact et définitif? On s'exposerait à avoir deux rapports distincts, l'un fait par le juge corrigeant l'état de votation tel que fait à la clôture du poll, et celui de l'officier-rapporteur, fait quelques jours après, et ne s'accordant ni l'un ni l'autre; et dans ce cas, lequel des deux devrait être accepté comme définitif? On voit de suite qu'un pareil système mènerait à l'absurde, et combien il importe, dans l'espèce, d'écarter la lettre de la loi pour en chercher l'esprit et en

faire une application sûre et raisonnable. Je suis donc d'opinion que le juge a le droit de reviser non-seulement le rapport du sous-officier-rapporteur, mais aussi celui de l'officier-rapporteur.

Voyons maintenant si, dans le cas actuel, il y a lieu à la révision du rapport de l'officier-rapporteur.

Ce rapport est basé uniquement sur les relevés que cet officier a trouvés dans les boîtes du scrutin; quelques-uns de ces relevés, d'après les allégations de la requête, sont incomplets et irréguliers; dans certains bureaux de votation, les relevés manquaient complètement.

L'officier-rapporteur, s'en tenant à la lettre de la loi (section 290), a constaté le nombre des votes d'après les relevés qu'il a trouvés, sans s'enquérir aux autres sources d'informations qu'il avait sous la main, pour remplir les lacunes et suppléer aux relevés manquant. On prétend qu'en agissant ainsi, il s'est tenu dans la stricte limite de ses devoirs, et qu'il ne pouvait agir autrement sans enfreindre la loi.

Suivant cet officier, et telle a été la prétention de l'adversaire du requérant à l'audience, l'officier-rapporteur ne doit prendre en considération, pour faire son rapport, que les relevés qu'il trouve dans la boîte; de sorte que s'il ne s'en trouvait aucun, il ne ferait aucun rapport, et comme conséquence, il n'y aurait pas de certificat d'élection. En vain lui objecte-t-on que les sections 201 et suivantes lui donnent le pouvoir de consulter les listes qui ont servi à la votation et portent un certificat attesté sous serment de l'état de la votation à la clôture du poll et des votes enregistrés pour chaque candidat, ainsi que le cahier de votation et tous les documents qui ont servi à la votation et que le sous-officier-rapporteur est tenu de déposer dans la boîte du scrutin; il répond que l'exercice de ce pouvoir est limité au seul cas où les boîtes, ou l'une d'elles, manqueraient ou serait perdue. Cette interprétation me paraît erronée, et son application en serait trop dangereuse pour qu'elle rende le véritable esprit de la loi.

En déclarant que l'officier-rapporteur devra se procurer de toute personne les ayant en sa possession les listes, relevés et certificats requis par le statut, la loi suppose nécessairement le cas où ces documents ont disparu; mais quand cet officier les a en sa possession et les trouve dans la boîte même du scrutin, quel prétexte

plausible peut-il avoir de ne pas les consulter ? Quand le statut parle de la boîte qui contient les bulletins et documents d'élection, cela s'entend non-seulement du contenant, mais aussi du contenu. Pour comprendre ce qu'il y aurait de dangereux dans la pratique du système adopté par l'officier-rapporteur, il suffirait de supposer le cas où le sous officier-rapporteur, soit par négarde, soit volontairement, aurait mis son relevé dans l'enveloppe scellée qui contient les bulletins de vote ; dans ce cas l'officier-rapporteur, qui n'a pas le droit de briser le sceau de cette enveloppe, serait, quoique muni de tous les autres renseignements, dans l'impossibilité de faire son rapport ; et à cela on ajoute que le juge lui-même n'aurait pas le droit quand il a devant lui tous les documents de la votation, y compris les bulletins eux-mêmes, de briser le sceau qui les tient au secret, attendu que l'officier-rapporteur n'aurait pu faire son rapport ! On voit de suite à quel état de choses cela nous conduirait, et il suffit d'énoncer la prétention de l'officier-rapporteur pour démontrer qu'elle est erronée et contraire à l'intention du statut.

Je suis, sur le tout, d'opinion que l'officier-rapporteur s'est mépris sur le véritable sens de la loi et dans l'interprétation qu'il en a faite ; il n'a pas fait l'addition des votes que le statut exige et son rapport est insuffisant. Jugeant qu'il est, comme le sous officier-rapporteur, soumis à la juridiction du juge, pour les fins de l'acte qui permet le recompte, j'ordonne que le dépouillement du scrutin ait lieu et que le recompte des votes se fasse.

Recount ordered.

Lacoste & Co. for Petitioner.

Mercier & Co. for J. A. Descarries.

COURT OF REVIEW.

MONTREAL, October 31, 1883.

Before TORRANCE, JETTÉ & MATHIEU, JJ.

BEACHEMIN V. LA CORPORATION DE LA VILLE DE ST. JEAN.

Corporation—Defective sidewalk—Costs.

A municipal corporation is responsible for the condition of the sidewalks and streets, without proof that it had notice of the defects which led to the accident.

TORRANCE, J. The action here was to recover damages suffered by plaintiff from the defective

condition of the sidewalks of defendant. The City was condemned to pay \$80 with costs as in an action over \$100. The defendant in review complained that there was no proof of the pavement being defective before the accident, and no proof that they had ever been notified of any accident, and therefore they were not liable.

This question was decided against the City of Quebec in appeal in the case of *Kelly v. The City of Quebec*, 10 R. Légale, 605.

Another point brought into review was the condemnation to costs beyond the \$80, amount of principal condemnation. This was usual and in the discretion of the Court.

Judgment confirmed.

Pagnuelo & Co., for plaintiff.

Robidoux & Co., for defendant.

COURT OF REVIEW.

MONTREAL, Oct. 31, 1883.

Before TORRANCE, JETTÉ & MATHIEU, JJ.

ARPIN V. ROY et al.

Insolvent Act of 1875, Section 61—Claim incorrectly described in statement of liabilities.

The insolvent, in the statement of his affairs, described a note made in December as having been made in June. Held, that he was not discharged from the claim by his discharge in insolvency.

TORRANCE, J. The action was on a note made by Roy, and indorsed by the other defendant Dubois. Roy pleaded his discharge in insolvency. Dubois pleaded that he was discharged by the negligence of Arpin in not claiming against Roy in insolvency, and that Arpin had given Roy delay which had discharged Dubois. The Court below found for plaintiff on all these pleas. The point of chief importance was whether the discharge in insolvency had affected the claim of plaintiff. By section 61 of the Insolvent Act, Roy, in order to have the advantage of the Act, had to specify the note in the statement of his affairs. He mentioned a note made in June and this was made in December. The Court said it was insufficient. The case of *Duhamel & Payette*, 1 Legal News, 162, and *Bank of N. America v. Copeland*, 4 Legal News, 154, are in point. I see no error.

JETTÉ, J., dissented.

Judgment confirmed.

Lorrain, for plaintiff.

Geoffrion & Co., for defendant.

COURT OF REVIEW.

MONTREAL, October 31, 1883.

Before TORRANCE, RAINVILLE & MATHINU, JJ.

In re PILON, Petitioner, & FOUCAULT, contesting.

Insolvent Act of 1875, Section 56—Failure of Insolvent to keep books of account showing his receipts and disbursements.

TORRANCE, J. The petitioner Pilon was an insolvent, and, applying for his discharge, was opposed by Foucault. The opposition was successful on the ground that the petitioner had not kept proper books of account showing his receipts and disbursements, as required by the Insolvent Act, 1875, S. 56. The judgment of the Court in the District of Terrebonne was correct and should be confirmed.

Judgment confirmed.

*Pagnuelo & Co., for petitioner.**Prevost & Co., for contestant.*

COURT OF QUEEN'S BENCH.

MONTREAL, October 31, 1883.

*DORION, C.J., MONK, RAMSAY & BABY, JJ.*THE CONSOLIDATED BANK OF CANADA, Appellant,
& MOAT, Respondent.*Insolvent Act of 1875, Section 88—Interest-bearing debt.*

The creditor of a hypothecary debt bearing interest due by one of the partners, is entitled to be paid interest in full up to date of collocation out of the private estate of the partner, before the creditors of the firm are entitled to rank against the private estate.

RAMSAY, J. The respondent, creditor of a partner of an insolvent firm, was collocated on the private estate for his debt and interest on it.

The question to be decided turns on the interpretation to be given to sect. 88 of the Insolvent Act, 1875. It is contended by appellant, that the claims which are to be paid *in full*, do not include interest due on an hypothecary debt. The argument is this: this disposition of the law is taken from an English statute, under which it has been held that the claim does not include interest, and it is offered as a legal pro-

position, that when an institution is borrowed from a foreign legislation, it is presumed to be taken accompanied by the jurisprudence in such foreign country at the time the legislation is introduced. We are also referred to section 80 of our Act of 1875, to show that interest generally does not form part of the claim in insolvency. It is further said, as the reason of the thing, that interest ceases because the debtor has surrendered the thing, and consequently that interest can no longer run for what he has not got. And finally, that the idea of the insolvent act is, that so far as distribution is concerned—or rather ranking—the whole thing is petrified at the moment of a valid assignment.

The law may be very good, and the reason given for it the reverse. It may be good law to say that under our positive law insolvency puts an end to interest, and to give as a reason for it, that it is because the insolvent has surrendered his estate is clearly untenable whether we look at it technically, or from the point of equity. Technically, there is no surrender to the creditor. It is made to a legal person who administers for the benefit of the creditors, it is true, but finally, for the profit of the debtor himself, for he gets the residue, if any there be. The abstract proposition, that insolvency puts an end to interest, was in reality abandoned when appellant admitted that the debtor would be liable for interest before he could get back the residue. If he continues liable for the interest it had not ceased to run. Equitably, it seems to me the argument is no better. Why it should be less fair to claim the interest of the debt bearing interest than the principal, it is difficult to say.

It may, however, be absolute law.

The words "subject to rebate of interest" in section 80, appear to me to have no application to the question before us. They appear to me to refer only to debts *due and not actually payable*. The creditor cannot claim on them for prospective interest, although forming part of the obligation. But without creating any confusion, they may be applied to debts payable and to debts not payable. Both stand on the same footing.

Sec. 88 is not borrowed from the English act, at all events, so far as this Province is concerned, but from cap. 4 of the Sts. of Canada of 1859,

continued in cap. 65, C. S. L. C., sec. 6, and incorporated in C. C., art. 1899. In all this casting and re-casting of the statute law there is not a word to show that the privilege of the creditor of the private estate of a partner over the assets of the private estate is limited to a portion of the debt. The section of the Act in the Consolidated Statutes is in these words: "The net proceeds of the separate estate of each partner shall be apportioned in the first instance to pay the creditors of his separate estate," and it is only the balance which goes to swell the proceeds of the partnership estate, if necessary for the payment of creditors."

Again, even if the section were borrowed from an English Statute, I think it would be overstating the rule to say that we must take its English jurisprudence with it. English jurisprudence on a statute exactly corresponding to ours, is certainly some authority, but I don't think it would be declaratory of the intention of the legislature. The authorities cited in Clarke, (p. 10) only go the length of saying, that a re-enactment of the same words is supposed to imply that the legislature is satisfied with the interpretation; but really this goes little further than to say that the re-enactment of the same words does not destroy the jurisprudence on the former statute or specially authorize a new departure. I can hardly fancy, at all events under our views of jurisprudence, that it will be maintained that the re-enactment of a statute in the same words would fasten an evidently erroneous interpretation of words on the world, adopted by one or two judgments, which do not indicate a general acquiescence in a doctrine. Lastly, if a *dictum* of the sort were binding, I don't know where it is to be found with regard to this clause. The appellant, when stating the point in immediate connection with his authorities, involuntarily recedes from the position that could alone save his position. He states the doctrine correctly when he says, that interest is not allowed "where creditor is competing with creditor." But this is obviously not applicable when the competition is between privileged and non-privileged creditor. This is fully explained in 1 Bedarride, p. 128, the authority cited by appellant. This writer says that interest "*courant en faveur de tous*" is not reckoned because it would be uselessly to swell the amounts and keep the accounts open. But

he expressly says it does not apply to privileged and hypothecary claims. Renouard and Pardessus are not less explicit. Here the creditors are not even competing. It is the mass of the partnership estate which claims the balance after paying the creditors of the private estate in full. We are all to reject the appeal.

There are two other cases involving precisely the same question, in which the judgments appealed from are confirmed and the appeals dismissed with costs.

In the case of the Consolidated Bank & Moat there is a cross appeal. The Court below held that the cross-appellant, though entitled to interest, had charged compound interest, and a portion of his claim (\$1,416.66) was disallowed. At the argument it was stated that the payments had been charged first to the reduction of interest, and that this was the legal mode of imputation. Of course, it was not denied, that if the fact was as stated the appellant must succeed. We have looked into the matter and find that the cross-appellant is correct, and therefore the judgment of the Court below must be so far reformed, and the cross appellant must have the costs of his cross appeal.

Robertson, Ritchie & Fleet, for Consolidated Bank.

Laflamme, Q.C., counsel.

Abbott, Tait & Abbotts, for Moat.

COURT OF QUEEN'S BENCH.

MONTREAL, Oct. 31, 1883.

DORION, C.J., MONK, J., RAMSAY, J., BABY, J.

HOWLEY V. THE STANDARD INSURANCE COMPANY.

Procedure—Bailiff's return—Exception to the form.

The truth of the bailiff's return of service of summons may be contested by exception à la forme, the conclusions of which pray for permission to contest.

The bailiff who served the writ and declaration in this cause certified that the service had been made by speaking to, and leaving a true and certified copy thereof, for said Company, "defendants, with a grown and reasonable "person in care at their principal place of business in Montreal."

The defendants filed an *exception à la forme*, alleging in substance that their head office was

at Hamilton, in the Province of Ontario, and that before the date of the alleged service, the defendants had ceased doing business in Montreal, and had not at the time of said alleged service, any office in Montreal where, or any agent there upon whom, service could be made; that the return was false, and they prayed to be allowed to contest the truth thereof, and that it might be declared false, &c.

The plaintiff filed an answer in law, in which he alleged that the exception was unfounded and illegal, because the truth of the return could only be contested by improbation, or by motion if the court so ordered, and not by exception *à la forme*.

The Superior Court (Loranger, J.) dismissed the exception with costs, the *Considérant* of the judgment being:

"Que la vérité du rapport de signification en 'cette cause ne peut être contestée par voie d'exception à la forme, mais doit l'être soit 'par inscription de faux ou par requête sur per-mission du tribunal.'"

Tait, Q. C., moved for leave to appeal from this interlocutory judgment, and cited *C. C. P.* articles 116, 119, 79, and 159; *Hudon v. Solman*, 12 L. C. J. 120; *McMillan v. Buchanan*, 17 L. C. J. 13; *Brosseau v. Alves*, 17 L. C. J. 228; 2 Doutre P. C. 36, Nos. 74 & 75.

Morris, contra, relied on Arts. 79 and 159 C. C. P., and also contended that the two cases last above cited supported the judgment.

The Court intimated that it was against the judgment, and suggested that the plaintiff would save costs by desisting therefrom; as the appeal would have to be allowed.

The judgment was accordingly desisted from.

Motion granted as to costs.

Abbott, Tait & Abbotts for defendant moving.
J. L. Morris for plaintiff.

GENERAL NOTES.

The refusal of Lord Coleridge to visit Canada after he had led the Canadians to suppose that he would do so, has naturally caused a considerable amount of disappointment in that colony. All the arrangements for the reception of his Lordship had been made by the Bar of Ontario, the time for his visit to Toronto had been fixed by Lord Coleridge himself, and everything was in readiness for what we doubt not would have been a brilliant reception. To throw aside a definite engagement with the Bench and the Bar of—

what a writer in a Canadian journal not inaccurately describes as "the noblest province of the British Empire," is unfortunate to say the least.—*London Law Times*.

The *Chicago Legal News* says: "We have watched the course of the Lord Chief Justice since he has been in this country, very closely, and we have not been able to say that he has made any mistake except this one. This was certainly a mistake as the result has shown. He was invited to a complimentary dinner, which for reasons best known to himself he declined, and suggested to the committee that Sir James Hannen and Lord Justice Bowen would be glad to accept the complimentary dinner which was to be prepared for the Lord Chief Justice of England."

In accordance with a suggestion made to us by correspondents in Nebraska, we give below the pronunciation of such American names of reporters and legal authors as seem to be liable to mispronunciation:—Angell, Ain'jell; Bigelow, Big'el-o (g hard); Bingham, Bisp'ham; Bouvier, Boo-veer'; Brevard, Bre-yard'; Cheves, Chev'ess; Coldwell, Cald-well'; Deady, Deed'y; Denio, De-ny'o; Dessausure, Des-saus-sure; Deyereux, Deve'r-o; Dillon, Dil'lon; Du-vall, Du-vall'; Ewell, Yew'el; Gill, Gillman, G hard; Gilmer, Gilpin, G hard; Henning, Hen'ing; Houck, Howk'; Houston, Hows-ton; Keyes, Kise; Lea, Leo; Leigh, Lee; Littell, Lit-tell'; McLean, Mac-lane; Minot, My'nott'; Rapalle, Rap' al-jay; Schouler, Skool'er; Taney, Taw'ney; Wythe, With (th as in thong); Yates, Yates.—*Soule and Bugbee's Legal Bibliography*.

Some curious ceremonies, says an English journal, are still kept up in the Tower of London. That of locking up the tower of nights is the most ancient, and the most stately. A few minutes before the clock strikes eleven, the porter, with an attendant, appears before the main guard-house, carrying a lantern, and calls out, "Escort Keys." The guard, supplied always from the Queen's Household Troops, then turns out and escorts "Keys" to the outer gate, called the "Spur," each sentry challenging as they pass his post, "Who goes there?" "Keys." After the gates are securely locked and barred, the procession returns, the sentries exacting the same explanation as before. When they come in front of the main guard-house the sentry stationed there gives a loud stamp on the ground with his foot and demands, "Who goes there?" "Keys." "Whose keys?" "Queen Victoria's keys." "Pass, Queen Victoria's keys and all's well." The porter then calls out, "God bless Queen Victoria!" to which the main guard responds, "Amen." The guard then presents arms, the officer kisses the hilt of his sword, and the keys are deposited in the lieutenant's lodging. After this all ingress and egress is impossible.

Not many years ago there lived in the city of Montgomery, Alabama, a young man whom we will call Smith. He had not long resided in the city before he betook himself to the study of law, and to that end borrowed a straight back chair and space to put it, in the office of one of the prominent law firms in that city. One day the senior member of the firm requested Smith to look up for him some authorities on the question of ejectment. Smith undertook his task with great alacrity and felt highly flattered that his instructor should have intrusted to him so important a matter. The first volumes in which he began to make his search were the old English Reports. He had searched through almost the entire series of Reports without finding any authorities. And in almost every case he encountered, *Res.* figured as one of the parties. The search was long and arduous, however, before he lost his patience with *Res.* Finally he could stand it no longer, and impatiently exclaimed "Governor, who is this man Res? He is the most interminable litigant I ever heard of, and he must have lived to be two or three hundred years old."—*Alabama Law Journal*.

The Legal News.

VOL. VI. NOVEMBER 17, 1883. No. 46.

THE APPEAL TERMS.

Two extraordinary Terms of the Queen's Bench, appeal side, have been fixed for December and February in Montreal. The ordinary Terms are in November, January and March. At the opening of the Court, in Montreal, on the 15th instant, Mr. Justice Ramsay, addressing himself to the members of the bar, said: "I think it necessary to make a statement for the information of the bar, which in some sense is personal to me. The Government of the Province of Quebec has proclaimed two terms of this Court on the civil side, for some periods which are not very well defined; but I take it for granted that the times intended are from the 12th to the 23rd days of December, both days included, and from the 15th to the 27th days of February next, both days included. I don't know at whose suggestion these terms were proclaimed. Their effect will be this, that we are to sit from to-day (15th November) till the end of March next, with no other break of any moment, save from the 24th December to the 14th of January next. It is obvious that this is an impossibility. It leaves no time to deliberate; so, if we could hear cases as continuously as is proposed, we should be unable to decide them. I have endeavored to make these terms useful by arranging to sit four days a week, so as to give us two days a week for deliberation, but that effort has failed. I am, therefore, obliged to take a stand, not only for the protection of my health, but of my reputation. During the last seven years I have represented over and over again to members of the local Government, to members of the House of Assembly, and to others interested, the importance of giving greater facilities for the administration of justice in this Court. Thus full warning has been given of the danger before the accumulation of arrears was as great as it is now. No effectual steps were taken to avoid it, and therefore the fault is not in any way attributable to me, but to the supineness of the local Government. I am most willing to do all I can to

facilitate the business of the Court; but it is not part of my duty to attempt what is manifestly impossible. I therefore think it right to inform the bar, at the earliest moment, in order that they may be exposed to as little inconvenience as possible, that I shall not sit during the new term proclaimed for December. I shall at once communicate with the Minister of Justice on the subject, so that there may be no excuse that I have not put the matter in a tangible form."

NEGLIGENCE OF MUNICIPAL CORPORATION.

In our last issue (p. 357) we noted the case of *Beauchemin v. Corporation of St. Jean*, in which it was decided by the Court of Review that a municipal corporation may be held responsible in damages for an accident arising from the defective condition of a sidewalk, without it being necessary for the plaintiff to show that the corporation had notice of the defect. This decision appears to overrule a judgment in Review, rendered about twelve years ago, in *McGuire v. The Mayor et al., of Montreal*, (No. 1715 S. C., Montreal). In that case the plaintiff demanded damages from the city for a horse killed by their negligence in the care of the streets. On the 13th January, 1869, the plaintiff's man was driving the horse in a sleigh along St. James Street, which was then obstructed by lumps of ice chopped away from the sidewalk and thrown into the middle of the street. The horse broke his leg amid the ice, and was killed. The Superior Court (Mondelet, J.*), held that the Corporation was not liable (31st May, 1871). The judgment was confirmed in Review; *MacKay, Torrance, Beaudry, JJ.* (Torrance, J., dissenting), 30th Nov., 1871.

The question is one which has occasioned some difficulty in the courts of other countries. In a case decided by the Michigan Supreme Court on the 27th of February of this year, *Dotton v. Albion Common Council*, the action was against a municipality for personal injury caused by being thrown down by a defect in a street cross-walk. There was evidence that the walk had become seriously out of order and tottering several weeks prior to the plaintiff's injury, and that there were several defects

*Vide 3 Rev. Leg. 450.

therein. There was no actual notice to the authorities shown, but it appeared that the street commissioners resided in plain sight of the crossing. The Court held that a direction by the trial judge of a verdict for defendant, on the ground that there was no notice of the defect to defendant or to its officers shown, was error. It was not necessary that there should be express notice. If there existed a state of facts with which ignorance was not compatible except upon an assumption of failure to exercise reasonable official care, then there was sufficient ground for presuming notice. So far as the two cases are parallel the decision of the Michigan Supreme Court agrees with the judgment which we reported last week. For the information of those who may be desirous of following up the subject we append the following list of authorities cited:—*Dewey v. Detroit*, 15 Mich. 307; *Bequa v. Rochester*, 45 N. Y. 127; *Johnson v. Milwaukee*, 46 Wis. 568; *Colby v. Inhabitants of Westbrook*, 57 Me. 181; *Howe v. Plainfield*, 41 N. H. 135; *Prindle v. Fletcher*, 39 Vt. 255; *Manchester v. Hartford*, 30 Conn. 118; *Donaldson v. City of Boston*, 16 Gray, 508; *O'Neil v. New Orleans*, 30 La. Ann. 220.

Another case which agrees with the above so far as it goes, was decided by the Supreme Court of Rhode Island on the 14th of July of this year, *Bowman v. Tripp* (14 Rhode Island Reports). A. and B. were injured by driving into a pile of gravel in a highway, and brought suit against the town in which the highway was situated. The pile of gravel had been accumulating in the highway during an afternoon. To establish the negligence of the town authorities the plaintiff introduced in evidence the police regulations of the town, which made it the duty of the police patrolmen to note and report without delay all obstructions in the street. The Court held that the evidence was properly admitted. Had the police patrol performed its duty the obstruction would have been made innocuous.

MR. VINCENT ON CRIME.

Mr. Howard Vincent, as chairman of the Jurisprudence Department and the Crime Section of the Social Science Congress, on the 5th of October, delivered an address on the causes, results, prevention, detection, and punishment

of crime, and the treatment of discharged prisoners. He said that, excluding Ireland, the direct cost of crime in England, Wales, and Scotland was nearly six millions yearly in police, prisons, reformatories, legal proceedings, and the value of property stolen. Magistrates, police, prison officials, &c., numbered 74,000 persons. In 1881 there were apprehended, or cited, 825,657, or nearly one in 36 of the population, but only 94,868 for offences against the person and 122,761 for offences against property, the remaining three-fourths for minor offences. In recent years serious crime had diminished in amount if not in character. In 1882 there were only 101 more convicts than in 1871, notwithstanding the increase of the population by three and a half millions. This was largely attributed to the temperance movement, home missions, Board Schools, reformatories, and industrial schools. For 1880-81, London compared well with Paris, Berlin, and Vienna, Paris having proportionately most murders and robberies with violence, Berlin most forgeries, Vienna most burglaries, and London most larcenies from the person. It was no disparagement to education and temperance to say that the chief factor in prevention was the police. There were advantages in police forces locally independent, and much might be said against general consolidation, but it would be economical and it would facilitate prevention and detection of crime. The English police was the admiration and envy of foreigners; but it might be improved by the establishment of a central constabulary school for the general instruction of young constables. It was difficult to find good men; and they required two or three years' experience of ordinary police duty. The police laboured under greater disadvantages in England than in Scotland or abroad, owing to the facilities for the disposal of stolen property. This was the more serious because the most frequent crime was burglary. In London two-thirds of the robberies were committed in the absence of inmates or through windows and doors being left insecure. The culprit mostly escaped unobserved, and hundreds of receivers were ready to take the stolen property. The stolen goods bill had twice passed the House of Lords and its Select Committees. Sometimes the rapidity of procedure frustrated justice. A case had occurred in which a prisoner was

tried for murder within six weeks of his arrest and was acquitted, the very next day producing overwhelming evidence of guilt. It was generally found that an engraved portrait was more accurate and economical than a photograph. The telegraph was the most useful agent the police could employ. The *Police Gazette* was to be greatly improved next year, and the additional expense borne by the public funds. The press was a power in detection; but when officers were dogged and witnesses interviewed harm was sometimes done. If the identity of a culprit was clear, in an important case, capture was a question of time and money, if portrait, description, and handwriting were widely circulated. This had a moral effect on the person sought which, in more than one case, had caused a man to give himself up. In Great Britain, in about 60 cases out of every 100 the offenders were brought to justice. Of these an average of 75 per cent. were convicted. These results were quite as satisfactory as those obtained in foreign countries. In the metropolitan police district all the criminal business had been under his direction since April, 1871, and every offence against the criminal law was reported at once to him, and he became responsible for all subsequent proceedings. The same course was followed with all correspondence upon criminal business. For the work of detection he had under his control the Criminal Investigation Department, the chief officer of which was Mr. A. F. Williamson, who in the course of thirty years had rendered numerous services to the State. Five-and-twenty inspectors of advanced education, many of them speaking foreign languages, and others skilled draughtsmen or proficient in various accomplishments, served directly under him at Scotland yard. The remaining officers of the department were distributed among the twenty divisions. Every officer kept a detailed diary of his movements. The pay was exceedingly good, ranging from 88l to 750l a year. With reference to the effect of imprisonment on certain classes of culprits, he said: "In the case of a clerk who embezzles a trifling sum to pay a debt, of the servant who yields to temptation and takes a jewelled ornament to purchase some article of finery or an evening's amusement, of the unfortunate woman driven to conceal the birth of her natural child, would it not be far better if, while jus-

tice was vindicated, some means could be found of reforming the character without giving the prison taint? Such a system has been found in Massachusetts, and its success commends it to attention. It consists in releasing persons found guilty, upon probation, when the circumstances of the case appear to justify such a course. Their liberty is conditional upon the honesty of their proceedings, and if their conduct is not satisfactory they can be brought up, and without formality sentenced upon the previous finding. In 1882 about 85 per cent. thus treated have so conducted themselves as to merit approbation, and have been honourably discharged. There would be no difficulty or expense in the introduction of such a system in this country, and placing the probationer under the supervision of the police, who are already afforded sufficient powers under the Prevention of Crimes Acts. No public money is better spent than the 10,000l which is annually distributed among discharged prisoners' aid societies by the Government. The Convict office has been instrumental in obtaining upwards of 300 situations for license-holders and supervisees."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, October 31, 1883.

DORION, C. J., MONK, RAMSAY, TESSIER & CROSS, JJ.

MUNN et al. (plffs. below), Appellants, & BERGER & SONS (defts. below), Respondents.

Sale—Acceptance—Evidence.

Where it was admitted that there was no writing to establish the alleged contract, questions put to the witness tending to prove an acceptance of the goods by words were properly overruled.

The appeal was from a judgment of the Superior Court, Montreal, dismissing the appellants' action.

The suit in the court below was brought by the appellants, of Harbor grace, Nfld., against Lewis Berger & Sons, a body corporate, of Montreal, for the recovery of \$3,094. 71.

It was alleged that in 1880 the appellants, through their agents in Montreal, Lord & Munn, sold to respondents from 500 to 800 barrels of

Munn's steam refined pale seal oil, to arrive, at 57½ cents per gallon cash, less 3 per cent, with the provision that the appellant should have the right to ship 100 to 200 barrels additional to suit the vessel, the respondents to have the option of taking the same. The delivery of the oil was not to be made till 1st August. The appellants alleged that, in accordance with the contract, they shipped 778 casks of oil, which arrived in Montreal 1st July, 1880; that notice was given to the respondents of its arrival, and that Lord & Munn were instructed by respondents through their agents, to store the same, as it was not then required; that shortly after arrival and storage of the oil, the respondents, by their manager, ordered Lord & Munn to sell the oil at 60 cents per gallon; that five barrels were sold at this rate; that respondents then advanced the price to 62½ cents, but finally they refused to take the oil, and upon such refusal the oil was sold at the current market price, and a loss of \$3,094.71 was made.

The difficulty in the case was as to the proof of the sale to the respondents. There being no memorandum in writing in existence, the appellants endeavored to prove by verbal evidence the fact of the acceptance or partial acceptance, and the exercise of acts of ownership by the respondents over the oil so alleged to have been sold. They also endeavored to prove the contract by witnesses, but the presiding Judge was of opinion that the appellants could not prove the contract or the acceptance of the oil without a writing. The action was, therefore, dismissed for want of proof. The present appeal was from that judgment.

The plaintiffs had previously moved unsuccessfully for leave to appeal from the interlocutory rulings excluding verbal evidence; (see 4 Legal News, p. 218, for the report of the judgment on the motion for leave to appeal).

RAMSAY, J. On the interlocutory judgment rendered rejecting the evidence in this case, an appeal was asked for, and the questions now raised were then fully argued. The learned counsel for the appellants has put the case very clearly before us, but we see no reason to change our opinion. As the case is fully reported, it is unnecessary for me to repeat what was said in that case. Shortly, however, I may say that if a constructive

acceptance or an acceptance by words, takes the case out of the operation of article 1235 (not the Statute of Frauds) then the article is valueless. As was said when the case was before us on the former appeal, one of the questions might be admissible as an introductory question, but as it was admitted that there was no writing to which such a question could be applicable, it was useless, and therefore, properly rejected. We are to confirm with costs.

Judgment confirmed.

Kerr & Carter for Appellants.

Abbott, Tait & Abbott for Respondents.

SUPERIOR COURT.

MONTREAL, Oct. 31, 1883.

Before JOHNSON, J.

BYRD V. CORNER.

Negligence—Estimation of Damages.

PER CURIAM. This is an action of damages for \$10,000 by the widow of a man named Macklaier, who is alleged to have been killed on the wharf here, against the master of the steamer Harold which was leaving the port, and in swinging round snapped her stern hawser, breaking both of Macklaier's legs, and so seriously injuring him that he died in consequence, at the General Hospital within two or three days. The case is clearly proved in every particular except one, viz.: the damages, in which, by the nature of things, there can only be proof of facts which may serve as a means of estimating them; and this proof is abundantly before the court. The deceased was a young man of about 33, of excellent conduct, and in perfect health, and leaves a widow and five children who have no means of support. He is proved to have been earning \$14 a week—but that was as checker, which I take it only gave him employment about seven months in the year—and I have no evidence as to what he may have been able to earn at other times—though it is not probable that such a man would have earned nothing all winter. I have not entered into details as to the accident, or the particulars of the evidence: it is not necessary. I shall say that from the evidence of the circumstances attending the misfortune, it appears to me an inevitable conclusion of common sense that there is negligence (*culpa*) in the defendant.

If the rope was properly used, and fit for its purpose, it ought not to have snapped. In point of fact it was overstrained: so says Mr. Shaw the portwarden and an experienced man in such matters. The defendant could have done nothing to prevent this. It depended altogether on those who were on board the ship. I find it impossible to point out anything that he did which could in any way have contributed to the accident, unless it be contribution to have been not only innocently, but at the special request of the defendant, exposed to it. From what I have said as to the grounds for estimating the damage it will be seen that I am held to give at least \$6,000 which would only yield \$360 per annum for the support of a woman, and her five children who must be clothed and educated.—Judgment for \$6,000, interest, and costs.

Abbott, Tail & Abbotts for plaintiff.

Laflamme & Co. for Respondent.

COUR SUPÉRIEURE.

DISTRICT DE TERREBONNE, Oct. 1883.

Coram BELANGER, J.

BERTRAND V. LALONDE.

Commissaires d'écoles—Nomination par le Lieutenant Gouverneur en Conseil.

En janvier dernier un jugement rendu devant cette cour déclarait illégale et absolument nulle l'élection des commissaires d'écoles, qui avait eu lieu au mois de juillet précédent pour la paroisse de St. Placide. Sur ce jugement le département de l'Instruction publique fut appelé à faire une nouvelle nomination, et sur un rapport du surintendant de l'Instruction publique, le lieutenant-gouverneur en conseil nomma, en mars dernier, M. Gadoury, de Saint-Jacques. Le 15 juin dernier Gadoury fut destitué par le lieutenant-gouverneur en conseil, qui nomma Lalonde, le défendeur actuel, pour le remplacer.

De là la présente action; le requérant demande, par un "Quo Warranto," que la nomination de Lalonde soit déclarée illégale, etc., prétendant que le surintendant de l'Instruction publique avait nommé Gadoury, et que le lieutenant-gouverneur en conseil n'avait pas le droit de le destituer; ajoutant que si toutefois Gadoury avait été nommé par le lieutenant-gouverneur en conseil, cette nomination était illégale et

que même dans ce cas, Lalonde devait être déclaré usurpateur du siège, le requérant soutenant que le surintendant seul pouvait faire la nomination.

La cour, adoptant les vues de la défense, a décidé que la nomination de Gadoury avait été légalement faite par le lieutenant-gouverneur en conseil, et que ce dernier avait agi légalement en le destituant pour nommer le défendeur à sa place.

Pagnuelo & St. Jean, pour le requérant.

C. L. Champagne, pour l'opposant.

THE ENGLISH ELECTION LAW.

The new Electoral Corruptions Act begins by defining "corrupt practices." These are "treating," "undue influence," "bribery," and "personation." Under the Act of 1854 only a candidate could be guilty of the offence known as "treating," but now any person who provides or accepts any entertainment with a view to influencing a vote will be guilty of treating. "Undue influence" has also been carefully defined, so as to constitute an offence on the part of any one who uses, or threatens to use, any violence, or who inflicts or threatens to inflict, "any spiritual or temporal injury, damage, harm, or loss upon or against any person in order to induce or compel" him to vote or refrain from voting. The definitions of "bribery" and "personation" are the same as those contained in the Act of 1854, except that bribery now includes the offer of a place or employment, and personation includes an attempt to vote twice. The punishment of a candidate found, on an election petition, to be personally guilty of a "corrupt practice," is incapacity for ever sitting for the constituency in which he committed the offence, and of sitting at all, or of voting, or of holding a public office for a period of seven years. If a candidate is found guilty of a corrupt practice by his agents he will be incapable of representing the constituency in which the offence was committed for seven years; and any other person convicted on indictment of bribery, treating, or undue influence will be guilty of a misdemeanour, and will become liable to imprisonment, with or without hard labour, for a year, and to a fine of £200. The offence of "personation" constitutes a felony, the punishment for which is imprisonment with hard labour for a period not

exceeding two years; and any person convicted of any corrupt practice will become incapable of voting at any election, of holding any public office, and of sitting in the House of Commons for seven years. From the above it will be seen that while the present Act re-enacts a great deal of old law, it extends the definition of corrupt practices, and makes the punishment for them far more stringent than before.

We next come to what are called "illegal practices." Of these there are several. Thus no payment may be made for carrying voters to the poll, nor for permitting bills to be posted on a wall, nor the use of any committee-room beyond the number limited by the Act; and it is also an illegal practice for a candidate or his agent to incur a greater expense than is allowed by the Act, or to induce any person to vote who is by law prohibited from voting, or to publish knowingly a false announcement that a candidate has withdrawn from a contest. A person may be convicted of an illegal practice on summary conviction, and will thereupon become liable to a penalty of £100, and will be incapable of voting for a period of five years at any election within the county or borough where the offence was committed. Besides "illegal practices," the Act constitutes as illegalities what are described as "illegal payment, employment, and hiring." These, which are new provisions, comprise lending or borrowing any horse or vehicle for the purpose of conveying voters to the poll, except in the case of persons hiring for themselves; procuring the withdrawal of a candidate by payment, or withdrawing in consideration of payment; purchasing or hiring bands, torches, flags, or ribands; and engaging anyone to perform for payment any service not expressly permitted by the Act. To engage a committee-room in any licensed house, or where refreshments are sold and consumed, or in any public elementary school, will also constitute the same offence, to which is attached, on summary conviction, a penalty of £100; and if the person committing the offence be a candidate or an agent, he will also be guilty of an illegal practice. Having thus defined the various species of corruption at considerable length, and with great care, the Act provides (sect. 22) for excusing such offences in certain cases. Thus, when a candidate is guilty by his agents of certain corrupt and illegal practices, and it

is proved that the offences were committed contrary to the orders of the candidate, and without his sanction or connivance, or that of his election agent; that he or his election agent took all reasonable means to prevent the commission of such offences; that they were of a trivial, unimportant, and limited character; and that in all other respects the election was free from any corrupt or illegal practice, the election will not be void, nor will the candidate be subject to any incapacity. The High Court and an Election Court are also empowered to except any innocent act from being an illegal practice, etc., and to exonerate the candidate or any other person from the consequences thereof, if it shall appear after notice, that the illegal act arose from inadvertence, and not from any want of good faith.

The next part of the Act, commencing with section 24, deals with election expenses, which are most minutely and elaborately treated, and the election agent, who is required to be appointed by the candidate on or before the nomination day, will take a prominent position, and incur great responsibility in connection with the expenditure of money. One election agent only is to be appointed. He may appoint as many sub-agents to act in different polling districts as may be required; but the number must be in proportion to the size of the constituency, and in accordance with very stringent regulations which are laid down in one of the schedules of the Act. All contracts and all payments are to be made through the election agent, and no advance may be made by, or on behalf of, a candidate except through the same officer. Claims against a candidate are to be sent in to the election agent within a fortnight of the election, and all accounts are to be paid by him within four weeks from the election. Payment of any claim after that period will constitute an illegal practice. The personal expenses of a candidate may be paid by himself to the extent of £100, but any sum beyond that must be paid through the election agent. Within 35 days after the day on which the return is made, the election agent is to transmit to the returning-officer a true statement of all the expenses incurred, which is to be accompanied by a declaration by the agent verifying the statement. A similar declaration must also be made and sent by the candidate, within a week

after the statement has been delivered to the returning-officer; and until such declaration is made, the candidate elected may not sit and vote in the House of Commons, under a penalty of £100 a day, which may be sued for by anyone. Neglect to send in these declarations will constitute an illegal practice, and a false statement will be perjury and a corrupt practice. But the High Court or an Election Court may, for good cause shown, extend the time for sending in a return and declaration. The regulations as to the number of persons who may be employed at an election for payment, and the amount which may be expended, are contained in the first schedule to the Act. Thus in boroughs there may be one clerk and one messenger for every 500 electors. One clerk and one messenger may be appointed for every 5,000 voters for the central committee rooms in a county, and also one clerk and one messenger for every 500 electors in a polling district. The number of committee rooms is limited to one to every 500 electors, whether in a borough or a county. The total sum which may be expended, not including personal expenses and returning officer's charges, is fixed at £350 in boroughs if the number of electors on the register does not exceed 2,000, and at £380 if the register contains more than 2,000 names, an additional £30 being allowed for every additional 1,000 names on the register above 2,000. In counties the amount is fixed at £650 in England and Scotland, and £500 in Ireland, if the number of electors does not exceed 2,000. If the number exceeds 2,000, £710 may be expended in England and Scotland, and £540 in Ireland, an additional £60 being allowed in England and Scotland, and £40 in Ireland, for every 1000 electors above 2,000. Where there are two joint candidates the amounts are to be reduced by one-fourth, and if there are more than two joint candidates the maximum is to be reduced by one-third.

The disqualification of electors forms an important item in the measure, and the prohibitions of persons guilty of infringements of the Acts are severe and extensive. But, on the other hand, ample security is given to a person charged with an offence to defend himself. A justice of the peace found guilty of an offence under the Act will be reported to the Lord Chancellor; and, in the case of a barrister or a

solicitor, the offender may be dealt with as if he had been guilty of professional misconduct; while a publican who is guilty of bribery or treating, or has suffered these offences to be committed on his premises, will have his conviction endorsed on his license. A list of disqualified voters is also to be made out, and is to be published with the register of electors. After the provisions relating to disqualification come the sections and sub-sections relating to proceedings on an election petition, which, if illegal practices are charged, is required to be presented within 14 days after the return of election expenses has been made; but, if the petition alleges payment of money since that date, it may be presented within a lunar month after such payment. A petition can only be withdrawn on affidavits by the parties stating the grounds upon which it is sought to be withdrawn, that there has no unlawful agreement, and that the agreement, if there has been one, was lawful. Copies of these affidavits are to be sent to the Public Prosecutor, who may be heard against the application for withdrawal. The same officer is also empowered to be heard at the trial of any petition; he may, with the leave of the court, examine or cross-examine witnesses; and he may direct the prosecution of anyone who has not received a certificate of indemnity. Any person prosecuted for a corrupt practice will have a right to be tried by a jury; but a person charged with that offence, if he appears before an Election Court, may be dealt with summarily and sentenced to six months' imprisonment, and if convicted summarily of an illegal practice he may be fined. But if an accused person does not appear before an Election Court the court may order his prosecution; and any person whom the court deems to have been guilty of corrupt or illegal practices may be ordered to pay all the costs of and incidental to his offence and its detection. Among the miscellaneous provisions is a power given to the public prosecutor to institute inquiries and prosecutions in any case in which he may think fit; and an indictment for any offence may, at the instance of the Attorney-General, or by order of the High Court, be removed for trial to the Central Criminal Court, or to the High Court before a special jury. There are also numerous other provisions, relating to practice and procedure.

RECENT UNITED STATES DECISIONS.

Corporation—When Director is entitled to compensation for services.—Where directors of a corporation appoint one of their number to act as treasurer, secretary, or other ministerial officer of the corporation, he is *prima facie* entitled to reasonable compensation for his services as such officer.—*First National Bank of Fort Scott v. Drake*, Kansas Supreme Court, 29 Kansas Rep.

Accident Insurance Policy—Forfeiture.—An accident insurance contract provided that no claim should be made for death or injury caused by voluntary exposure to unnecessary danger, or by walking or being on the bridge of any railway. A train on which insured was riding at night stopped on a bridge. He went to the front platform of the car in which he was riding, and stepped off and through a hole in the floor of the bridge, causing his death. The bridge, with the exception of this hole, was well covered with plank and quite safe. *Held*, that he did not violate the provision of the policy, and the insurance company was liable on the contract for his death.—*Burkhard v. Travelers Ins. Co.*, Pennsylvania Supreme Court, 28 A. L. J. 388.

Railway—Negligence.—A female passenger got off a train at a refreshment station, and in returning, owing to the removal of the train in her absence and the insufficient lighting of the premises, she fell and was injured. *Held*, that the company was liable.—*Peniston v. Chicago, etc., Railroad Co.*, 34 La. Ann. 777.

GENERAL NOTES.

The Court of Appeal at Toronto, like that at Montreal, has about 100 unheard cases on its roll.

Judge Gowan, who has just retired from the county judgeship of Simcoe, was over forty years on the bench. He was the senior county judge of the province, and was elevated to the bench when he was only twenty-five years old. In 1873 he was appointed one of the Royal Commissioners to enquire into the charges in relation to the Pacific Railway contract. In the following year he was appointed one of the Commissioners for the revision and consolidation of the Statutes of Ontario, a work brought to a close in 1877.

Boston is not alone in suffering a downfall from its intellectual supremacy. The day is past for provincial centres of national intelligence. Edinburgh has been deposed like Boston from a rank yet more exalted.

Weimar has sunk to be a petty residence town. Geneva has gone into trade and politics. Florence is no more an intellectual centre. Oxford and Cambridge retain no dictatorship in letters. It may seem to be only a transfer of the intellectual headship from one locality to another. The change may be supposed to be nothing but an instance of the common law of the rise and decline of local greatness. London may be deemed simply to have taken precedence of Edinburgh, and New York of Boston.—*Times*.

La Signora Lydia Post, a young lady who was recently admitted to the bar of Turin, has pleaded and won her first case. She was the advocate of a young painter whose pictures had been unjustly detained by his landlord, and much injured by the damp of the garret to which they had been consigned. The lady barrister obtained a great success by her humorous description of the subject of the pictures, and, amid much applause, obtained a verdict with damages in favor of her client. She was escorted home, still enveloped in her lawyer's robes, by a large concourse of people, who gave her a serenade in the evening, in which the tenor voice of the young painter was conspicuous for its deep expression.

In a French town, a drover and a butcher who had been adjusting their accounts in the market, went to a tavern to dine. During the meal the butcher took from his pocket a bank note of 100 francs value wherewith to pay the drover, but in handing it over let it fall into a dish of gravy. He snatched it out, and holding it between thumb and forefinger, waved it to and fro to dry it. The drover's dog accepted this movement as a friendly invitation, and, liking the smell of the saturated note, made a spring at it and swallowed it. The butcher was furious. "Give me my money," he demanded; "kill the dog and open it." "No," replied the drover; "my dog is worth more than 100 francs." "Then I owe you nothing. Your dog has collected for you before witnesses." "My dog is not my cashier. And besides, where is your receipt?" "The justice will have to settle this." "Let him." "The justice, it is said, has been searching in vain for a precedent for such a case.

An extraordinary case was recently decided in the Queen's Bench, London. A young man named Devenish, who had previously been a sailor, had been apprenticed to Mr. Tubb, a plumber, to learn that business. One night Devenish, whose habits seem to have partaken of the freedom of his former life and who was fond of "larks," was found in the room of Miss Tubb, where, he said on being questioned, that he had gone to get a light. Miss Tubb screamed with fright at the presence of the intruder and called to her mother, who was ill, it appears, in an adjacent room. Thereupon Mr. Tubb and the doctor, Maunders, who happened to be attending Mrs. Tubb, came upon the scene, when Devenish, fearing evil consequences to himself, threw himself upon the bed and pretended to be in a deep sleep. All the efforts of Messrs. Tubb and Maunders to arouse him were in vain, and at last the latter thought of the expedient of heating a poker and applying it to his person. Devenish still persisted in feigning unconsciousness, though the doctor used the poker with evident effect, but finally he got up and ran away. Some time after, he entered an action for damages against his employer and the physician, and the case gave rise to a good deal of fun in court. Though it appeared that Devenish had no business in Miss Tubb's room, the verdict acquitted him of all evil purpose, and his master was fined £25 and Dr. Maunders £30 for the assault and burning.

The Legal News.

VOL. VI. NOVEMBER 24, 1883. No. 47.

BUSINESS IN APPEAL.

The protest of Mr. Justice Ramsay which we published last week, with reference to the extra terms imposed by the local government on the Court of Queen's Bench, has naturally excited much comment. It is no doubt rather an unusual proceeding on the part of a judge to condemn, in the vigorous terms used by the learned judge, the supineness of a Government or rather a succession of Governments, which first turn a deaf ear to the reiterated suggestions made to them with the view of expediting the administration of justice, and then, the evil having been aggravated by delay, adopt the first expedient which suggests itself, heedless of the health and convenience of the judges, for such, in substance, is the complaint of the learned judge—but it is not the first time that it has occurred. We remember hearing something of the same kind from the late Mr. Justice Aylwin. See 3 L. C. Law Journal, pp. 97, 119.

From the main suggestion of Mr. Justice Ramsay, that the Court should not be burdened with forty or fifty arguments at a time without sufficient intervals being allowed for deliberation and judgment, we have heard no dissent anywhere. It is a proposition which commends itself to all, for the bar are well aware already that arguments at the end of a fatiguing term are often imperfectly appreciated and quickly forgotten. This has led to the practice, of late years, of making the printed cases much fuller than formerly, when merely the leading points were set out in the *factum*, and the full argument was reserved for the *viva voce* address.

As a matter of fact, the Court has been able to keep up with the current work; it has no arrears of *délibérés*, but it has been burdened by an arrearage in Montreal of about one hundred cases, dating back eight or nine years. The effect of this is that there is a delay in every instance of about a year between the inscription of a case and the judgment. This is a great evil, which should be remedied if possible. If the Court were once relieved of the Montreal arrears (there are no arrears at Quebec)

the current business could be dispatched promptly. Mr. Justice Ramsay has suggested that the Court should sit almost continuously at Montreal, but three or four days only in each week, allowing the intervening days for deliberation. It is somewhat doubtful whether this would enable the Court to clear the list, but it is certainly more likely to effect that result than the expedient of extra terms. At any rate, it seems to us that the judges themselves should have even more power than is now accorded to them, of arranging the terms and sittings as they think best.

Various expedients have been adopted at times to deal with the difficulty of an overcrowded roll. In New York and Ohio, and probably in other states, the cases in arrears in certain courts have been transferred to a commission to be disposed of, and thus the Court has been enabled to take a fresh start. This would be preferable to a delay of a year in every case for the next ten or twenty years. It has also been suggested in the case of the Quebec Appeal Court, that the Court might sit in two divisions of three judges each, at Quebec and Montreal. This would get rid of the arrears, but there are two objections which occur at once. The Quebec division would have a very small share of the work, and the prestige of the court might be diminished by conflicting decisions. Probably both these objections might be overcome. To the Quebec division might be assigned additional country districts, or the judges of the Quebec division might occasionally assist in Montreal. And as to the second objection, there might be a provision allowing an appeal to the Supreme Court on special application in cases which are not now susceptible of appeal; or there might be a re-hearing in certain cases before the six judges.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, November 19, 1883.

DORION, C.J., MONK, RAMSAY, TESSIER & CROSS, J.J.
HARVEY et al. (defts. below), Appellants, &
O'SHAUGHNESSY et al. (plffs. below), Respondents.

Liquidation of Mutual Building Society—Distribution of surplus assets.

To facilitate the liquidation of a mutual building society a resolution was passed at a meeting of

the borrowing members, to discharge those who within three months should pay 80 per cent of their indebtedness, the surplus, after paying the non-borrowing members in full, to be divided among the borrowing members. Held, that those non-borrowing members who did not discharge the Society, were not bound by this arrangement, and were entitled to claim the surplus to the exclusion of the borrowing members who had all discharged the Society.

The appeal is from a judgment of the Superior Court, Torrance, J., reported in 5 Legal News, p. 429.

RAMSBAY, J. The proceedings began by a mandamus, asking the Court to forbid the liquidators of a building society in liquidation to pay over the balance of the funds to certain borrowing members, and to order them to pay certain surplus funds over to the shareholders who had discharged the company. The liquidators maintained that the borrowing members were alone entitled to these surplus funds. The judgment, considering that the assets should not be distributed as belonging to the borrowing members *alone*, overrules defendants' plea, and orders the liquidators within thirty days to distribute among the members of the said society and holders of stock therein *who are entitled to share in said distribution*, namely, who have not already released and discharged the society, and to pay over to them on a dividend sheet, &c., to be prepared, and reserves the power to adjudge on the other conclusions.

The effect of this judgment is to give the whole assets to the members who are not borrowing members, for it appears that all the borrowing members have released and discharged the society.

The only question, then, is whether the deeds of release are an acknowledgment by the borrowing members that they are to abandon all claim on the assets. I can hardly understand words more explicit of such an intention. The following is an extract from one of the deeds, and it is admitted that the others are similar in their terms :—

"And in consideration of the premises and of the discharge hereby granted him, the said Edward Booth, who at the passing of these presents has handed over and delivered to the Society his subscription book No. 58, as also subscription book No. 320 of the said Society,

hereby specially and expressly renounces to the rights or claims of any kind or nature whatsoever, which he might now or at any time claim to exercise against said society as having been a member thereof and holder of said subscription book or for any other cause or reason whatsoever, and does hereby renounce all rights as a member of said society and withdraw therefrom, and does hereby further specially and expressly grant full, final and entire discharge, release and acquittance from and concerning all rights, claims and demands which he has or can or might have or pretend against the said society by reason of his membership thereof, or his having been a holder of said subscription book, or for any other cause or reason whatsoever."

Is there any principle on which in a deed of this sort we should interpret the clause otherwise than in the naked sense of the language? I know none. There was no possibility of error. It was a transaction to get out of a difficulty. Each set of shareholders agreed to a settlement, and the borrowers got an equivalent for what they gave up. In any case there was no balance coming to them. Error is not even pleaded, so that these borrowing members who have got fully paid under their deed are holding on to the advantages so acquired, and at the same time ask us to relieve them of their discharge. It is said we are to do this on equitable grounds and that it is very unfair shutting them out, for by so doing we are in effect giving \$3,000 to be divided among the eight remaining members of the Society. Equity is an excellent guide, but it is the equity of the law, not an emotional sentiment that somebody is getting too much. For my part I neither sorrow nor rejoice that the eight should get so much. It is the luck that falls to them for having stuck to their enterprise. They took all the trouble and ran all the risk, and however much or little that may be they are entitled to the surplus funds; for nothing is more certain than that the surplus funds of a company are not *res nullius*, but that they belong to the remaining members of the Society be they many or few. It was suggested to send back the case to the Court below, to allow other proceedings to be taken. But I don't see what is to be done; all the judgment says is that the members who have dis-

charged the Society will not be paid, and the majority of the Court think they ought not to be.

We are, therefore, to confirm with costs against appellants.

Cross, J. The St. Bridget's Building Society, whose affairs are in question in this suit, was a society organized under cap. 69 of the Consolidated Statutes for Lower Canada. It had two classes of members, having to some extent antagonistic interests, denominated in the factums of the parties borrowing members and non-borrowing members respectively.

The Society appears to have got into difficulties, and with a view to closing its business a meeting of its members was held on the 3rd of April, 1879, at which were discussed proposals for settling its affairs by the borrowing members anticipating the payment of their liabilities, which extended by instalments over a series of years, and getting a deduction in consideration of a present cash liquidation; on which conditions it was represented that the non-borrowing members would be satisfied to accept the proceeds on condition that they should get the actual amount invested by them without interest.

A special meeting of the borrowing members, with the same object, was held on the 2nd June, 1879. It appears by the minutes of these meetings, it was proposed that notarial documents should be prepared and signed, binding each class of shareholders to terms that would liquidate the affairs of the society, but these projects came to nothing, and were superseded by the proceedings of a meeting of the members of the society held on the 16th July, 1879, at which it was resolved that the society should go into liquidation under the provisions of the Dominion statute 42 Vic., c. 48.

At the same meeting the appellants were named liquidators.

These liquidators held a meeting on the 8th August, 1879, at which it was resolved that they should compound with the borrowing members at a certain amount of cash, according to the borrowing members' indebtedness, and that the board of liquidators would also take stock-books with the amounts therein as part payment of the borrowing members' indebtedness to the society at par value.

On the 11th of August following, the liqui-

dators and the borrowing members held separate meetings. At that of the borrowing members, the minutes declare that it was for the purpose of hearing the conditions of the Board of Liquidators upon which they the borrowing members could get a clear discharge from the society. The President announced that the Board of Liquidators would take a certain amount of cash according to the face of each member's debt as shown in the ledger; some discussion ensued as to the rate of discount, when it was finally resolved that should there be any surplus after paying all the non-borrowers dollar for dollar, as that was all they wanted, it would be divided amongst the borrowing members, provided they would all pay up within three months, after which they would be charged interest.

The non-borrowing members were not represented at this meeting, unless they could be said to be so through the liquidators, in the person who acted as president of the meeting.

At the liquidators' meeting of the same date it was announced that a number of the borrowing members gave their names to go out in accordance with the proposition of the liquidators made to them. Upwards of thirty names are entered as so agreeing. This proposition may have been according to their meeting of the 8th of August, or it may have been what the President announced at the borrowing members' meeting of that day, the President so called being the former president of the directors and one of the liquidators.

The borrowing members seem to have liquidated their liabilities by paying 80 cents in the dollar of those liabilities, partly in cash and partly in the credits contained in books of the non-borrowing members taken at par, and in settling with the society, in place of reserving any right to participate in a surplus, they formally, by the same notarial documents which contained the discharge of their indebtedness, renounced specially and expressly, all rights and claims of any kind or nature whatsoever, which they might then or at any time claim to exercise against the Society as being members thereof, or for any cause whatever, granting the Society a most full and ample discharge. A specimen deed is produced, dated the 13th August, 1879, and the others are admitted to be to the same effect.

By these proceedings a surplus of between two and three thousand dollars was realized by the liquidators, who had obtained full discharge to the society from the members so compounding, and in consequence of the surrender of a great number of the books of the non-borrowing members, those remaining were reduced to a very small number. Under these circumstances the present respondents sued out a mandamus directed to the appellants as liquidators, requiring them to distribute the surplus among those who remained members of the society, consisting of the petitioners and some others of the non-borrowing members who had not discharged their interest or retired from the society. To this the appellants have pleaded that there was an agreement that the surplus should be divided among the borrowing members. This the petitioners deny, and allege that they never agreed to any such distribution, and it was not in the power of the liquidators to make such conditions, which raises the question: Had the liquidators by the winding up Acts 42 Vic., c. 48, 42 and 43 Vic., c. 32, and the Statute of Quebec 42 and 43 Vic., c. 33, power to compound? Was the exercise of that power as practised by them in this case *ultra vires*? There is nothing in the proceedings referred to, to show that the non-borrowing members were ever consulted or ever gave their consent to relinquish their claims to the surplus. The borrowing members, carrying with them the rights of many non-borrowing members, formally agreed to discharge the Society. These discharges are not impugned or complained of as being made in error, or subject to be set aside for any cause warranted by law, and were executed posterior to the pretended agreement. In such a matter non-borrowing members could not have their rights forfeited even by a resolution of a meeting of all the shareholders, nor without the specific consent of each, much less by a resolution of the borrowing members. The liquidators had power under the winding up Acts to compound with debtors of the Society, but they could not force creditors to diminish their demands.

A further still stronger reason is, that the liquidators were all borrowing members save one only, viz., Lunny, and he consented to the petition of the respondents.

It is true that another of their number was

both a non-borrowing and a borrowing member, but even taking out his name it left the majority borrowing members. It was illegal for them to vote on such a question in their own favor, and the law would hold their votes a nullity. See Brice on *Ultra Vires*, p. 867, and the case of *Atwool v. Merryweather*, L. R. 5 Equity, p. 484.

If parties who have rights find they have been excluded, the judgment in the present case would not necessarily destroy their recourse. The appellants show no grievance, and as regards them the judgment should be confirmed.

DORION, C. J., and MONK, J., dissented.

Judgment confirmed.

Doutre & Joseph for appellants.

Doherty & Doherty for respondents.

COURT OF QUEEN'S BENCH.

MONTREAL, March 24, 1883.

DORION, C. J., MONK, RAMSAY, CROSS & BABY, JJ.

(No. 431) MOLSON (contestant below), Appellant, and CARTER (plaintiff below), Respondent.

(Nos. 432 & 433) HOLMES, Appellant, & CARTER, Respondent (two cases).

Will—Property declared inassaisable.

Where property was bequeathed with the condition that it should be unseizable, and was substituted to the children of the heirs, and the executors sold a portion to one of the heirs, held, that the effect was to make a partition, and the revenues of said property were unseizable.

The contestations arose in this way:—In 1875, the appellant, Alexander Molson, was desirous of effecting a loan for \$30,000, and he offered as security certain property in St. James street, occupied by one Freeman as tenant. He applied, in the first instance, to the agent of the estate Masson, but the matter having been referred to the solicitors of the estate, the latter reported that the security was unsatisfactory, as, in their opinion, the property was entailed in favor of Molson's children. Shortly afterwards, Molson obtained the \$30,000 from the respondent, represented by the Hon. J. J. C. Abbott, the security for the loan being the above mentioned property. Some time subsequent to

this, Molson being embarrassed and the interest not being paid, and Mr. Abbott being informed that the \$30,000, which had been deposited in the Mechanics' Bank, had been withdrawn by Molson, the latter was arrested under a *capias* on the charge of secreting. The case was pending in the courts for several years, and was finally decided by a majority of the Court of Appeals against Molson, and judgment for the \$30,000 was obtained against him by Mr. Carter, the respondent. It was upon the execution of this judgment that the present cases arose. A *saisie-arrest* was issued, seizing rents of the property mortgaged, in the hands of the tenant, and also the dividends on certain shares in the Molsons Bank. The appellant Molson contested this seizure, and his wife intervened and also contested the seizure, both in her own name and as tutrix to her minor children. The Court below dismissed all three contestations, and it was from these judgments that the present appeals were instituted.

On the contestation by Molson in his own name, it was submitted on his behalf that the real estate and the bank stock in question were declared to be unseizable by the will of his father, the late John Molson, the intention being that they should be an aliment for the family. By the will referred to, executors were named, and these executors had undertaken, in 1871, to make a sale of the property to Mr. Alex. Molson personally, but his true title to the property was a *partage* of his father's estate, under the will, which declared the property to be *insaisissable*, and to be for the aliment of the son and his family. In behalf of Mrs. Molson, it was contended that she could not be made responsible for the act of Mr. Molson in mortgaging the St. James street property.

For the respondent it was submitted that the sale to Mr. Molson in 1871, and the other proceedings, had been carried out by the trustees for the purpose of conveying the property in question to the appellant, in his individual right, free of any charge or incumbrance by reason of the conditions of the will, and, in fact, the property did become vested in the appellant individually. There was nothing registered against it, and consequently the mortgage in favor of Mr. Carter, which was duly registered, became the first charge on the property, and under the judgment obtained thereon Mr.

Carter was entitled to use all legal remedies for collecting his debt. At present only the rents and revenues were seized, and the rights pretended by Mrs. Molson under the will of the late John Molson were not affected by the seizure.

RAMSAY, J., who dissented in one case (No. 431) observed:

These three appeals all refer to one transaction. In execution of a judgment obtained by respondent against Molson, the dividend there might be on certain bank stock was seized, and also the rents due on a certain house the property of Molson.

The seizure is contested by Molson on the ground that the house, the rents of which are seized, and also the bank stock, forms part of the property he received from his father's estate, under the will of the father, by which the property bequeathed was not only substituted, but was declared *insaisissable*, both as to the capital and as to the interest and revenues thereof.

Mrs. Molson contests on the ground that she has an interest in this property, and consequently an interest to declare it *insaisissable*.

Thirdly, Mrs. Molson and her children raise the same question.

With regard to the Bank stocks, it is not shown that they represent any part of the property of the late John Molson's estate. They have not been kept separate, and are not distinguishable, or at least they have not been identified.

Then, as to the two last contestations as regards the revenues of the house, I don't think the intervening parties, appellants, have shown any interest. They might have an interest if the house itself was seized. But at the argument it was said that at any rate they had an interest, because if Molson required aliments they could be compelled to supply them. If this argument were tenable, all relatives subject to the possible obligation to furnish *aliments* to each other would have a right to intervene in the suits brought against any one of them for their own protection. This is evidently not the case, and I am of opinion that both these appeals should be dismissed.

The pretention of Molson is met on quite different ground. Respondent says, in the first place, that the house, the rent of which is seized, does not form part of the estate of the late

John Molson. That by the will of John Molson the executors, or the survivors of them, had power to sell all the real estate in order to make a division of the property, and that the proceeds of the sale should take the place of the original property; that they exercised this power, and executed deeds of sale to the various members of the family, and that the proceeds of these sales from that moment became the property substituted and declared *insaisissable*.

Respondent also contends that he lent to Molson his money, sought to be recovered by this execution, on the faith of a deed of sale duly enregistered, showing an unincumbered title in Molson; that if Molson's title was bad, it was so to the knowledge of Molson, and that by showing him a clear deed he had obtained respondent's money by fraud; and that as no one can profit by, or plead his own fraud, the defence in the mouth of Molson is inadmissible. He contends also, that there is evidence that Molson had been advised by counsel before the money was paid to him by respondent, that his title was defective.

Appellant makes answer to this: that the sale was merely a *partage* clothed with the form of a deed of sale, that the real character of the transaction was apparent on the face of the deed, which refers to the will, and that as it required two executors to convey the title, and as Alex. Molson could not convey to himself, there remained only William Molson as vendor, and therefore respondent had full notice that the deed could not be the whole title, and that he had to look to the will. That, in fact, there was no misrepresentation; that respondent's lawyer, who treated in the matter of the loan, had been the appellant's lawyer in the matter of the *partage* under the will, and that he had been made aware at the time of the loan, of the opinion of counsel that the title was bad as a deed of sale, and was in effect only a *partage*.

It is maintained by the appellant that, even if there were fraud, there is a prescription of the law which exempts from seizure "sums of money or objects given or bequeathed upon the condition of their being exempt from seizure." (558 C. C. P.)

I do not think we are obliged in this case to enter into the first question, namely, whether the transactions by way of sale are only, in effect, a mode of making a *partage*, as between

the heirs and their *ayants cause*. I may, however, observe *en passant*, that if the argument is sound, it seems hardly to go far enough, for if the executor, appellant, could not sell to himself he could not apportion to himself in any other way. The whole transaction, then, is null, if the sale be null as a sale. I may also express a doubt whether the sale by the executors to one of themselves is null *de plano*, and whether the executor who has made such sale can himself invoke its nullity. It may be questioned whether he has not had the full advantage of his father's bequest, and that the will is satisfied. If he has, his squandering his succession was evidently within his powers.

But, as I have said, I express no formal opinion on these questions, for I am strongly of the opinion that Molson obtained the money, if the deed be bad, by fraud, and that he cannot set this up. As for the provision of the C. C. P. referred to, it is only a general enumeration of things *insaisissables*, and in no wise is to be taken as a new enactment over-riding the common law. Now, I think the rule that no one can plead his own fraud is a fundamental principle of justice—one of those principles, which, whether expressed or not, must naturally be considered as untouched by particular rules. The texts of law which recognise this principle are numerous and well known—"no one can enrich himself at the expense of his neighbour," "no one can profit by his fraud," and so forth. Nor on general principle can fraud be covered by the protection given to special persons. Thus a woman is protected against her weakness, not against her fraud. And so we have the well-known rule, *mulieribus tunc succurendum est, cum defendantur, non ut facilius calumnientur*. De Reg. jur., 110. And so the wife had not the benefit of the *Senatus-consultus Velleianum* when she took a part in the fraud. Several instances in illustration of this principle are given in the code. And to the rule I know no exception, save when the fraud is in violation of a law of public order. The law which permits a donor to attach the condition he chooses, which is not against good morals, and hence to declare that the thing given is for alimments, and is *insaisissable*, does not fall into this category. And this suggests another idea, and it is, that if the restriction of the donor was to

cover the frauds of the donee, it would be immoral, at all events in its effects, and consequently opposed to the spirit of art. 760.

Yet another argument has been used. It is said that the deed of loan and hypothec and alleged fraud are not in question now, that the rents of the house were not hypothecated to Carter, that when returned into Court they will be subject to the claims of all creditors who have not been defrauded, and consequently Carter, who has been defrauded, must suffer. This is a strange conclusion. Carter says this: these revenues are the product of what you have hypothecated to me, and if I am not protected in the revenues of the thing my security is illusory. I think the rule, that the accessory follows the principal, applies here. Besides, it can hardly be said that this was the real ground of contestation. The whole argument was, that there was no fraud, and that the property was *insaisissable*. I do not think, then, that we can escape from the responsibility of deciding one or both of the questions. For my part, I have no hesitation in saying that there was fraud on the part of Molson, and that he is estopped from pleading it. *Dolo suo non debet quis lucrari, neque alii nocere*, 92, in *fin. C. de Transactionibus*, l. 30. Even if the evidence as to Mr. Dorion's opinion were to disappear, Molson was presumed to know the title he was giving.

The judgment of the Court was as follows :

"The Court, etc.

"Considering that by his last will bearing date the 20th of April, 1860, the late John Molson, after making several special bequests, devised and bequeathed the residue of his estate to William Molson his brother, Mary Ann Elizabeth Molson his wife, and Alexander Molson his youngest son, to hold, administer and manage the said residue for a period of ten years from his decease, with power to two of them, of whom William Molson while living should be one, to sell such part of his real estate as was not specially devised, and after the expiration of the ten years to divide the said residue or the proceeds thereof, between his five sons, in equal shares, to be enjoyed by them for their respective lives only, and after the decease of any of them, his share to become for ever the property of his lawful issue subject to the usufruct thereof on the part of the wife, if living,

of such son so long as she might remain a widow ;

"And considering that by his said will the said John Molson specially directed and ordained as an essential condition of the said bequests in favor of his five sons and of their widows respectively, that all the estate, interest and property, and all interest, revenue or income to arise therefrom should remain forever exempt from all liability for the debts, present or future, of them or any of them, and should be absolutely exempt from seizure (*insaisissables*) for any such debts or any other causes whatsoever, and should be held as a *legs d'aliments* not susceptible of being by them assigned or otherwise aliened for any purpose or cause whatsoever ;

"And considering that the said John Molson died on the 12th of July, 1860, without altering his said will ;

"And considering that on the 15th of June, 1871, the said William Molson and Alexander Molson acting as executors and trustees of the estate of the late John Molson, by deed passed before Phillips, notary public, sold to the said Alexander Molson a lot of land on St. James street of the city of Montreal, being No. 185 on the cadastral plan of the west ward of the said city belonging to the said estate, for the sum of \$30,779.52, which sum has been included in the share of the purchaser in the distribution of the estate and effects of the said late John Molson executed on the same day and before the same notary ;

"And considering that under the judgment rendered in this cause on the 17th of April 1878, the respondent has caused to be attached in the hands of Allan Freeman the rents due by him to the said Appellant on the lease of the said immoveable property lot No. 188 of the west ward of the city of Montreal, and also the dividends accrued and accruing on 148 shares of the capital stock of the Molsons Bank ;

"And considering that the said appellant has contested the said attachment on the ground that the said immoveable property and the said 148 shares of the Molsons Bank stock were part and portion of the property bequeathed to him by his father, the late John Molson, by his said will, and as such as well as the rents, issues and profits thereof, were not liable to be

seized, attached or sold for the debts of him, the said appellant, they being by the said will declared to be *inaliénables et insaisissables* and bequeathed *à titre d'aliments* ;

"And considering that the said respondent by his answers to the said contestation, contends that the said 148 shares in the capital stock of the Molsons Bank did not form part of the estate of the late John Molson and were not therefore subject to the condition of *insaisissabilité* imposed by the will of the late John Molson, and the said lot of land No. 185 of the cadastral plan of the west ward of the city of Montreal has ceased to be subject to the said condition by virtue of the sale of the said lot of land by the deed of the 15th of June, 1871, whereby the said lot of land became the absolute property of the said appellant, and ceased to form part of the property composing the estate of the said late John Molson ;

"And considering as regards the said 148 shares in the capital stock of the Molsons Bank, that although it appears by the evidence that the late John Molson was possessed at the time of his death of 3,200 shares in the capital stock of the Molsons Bank, of the value of \$160,000, yet it does not appear that by the division of the estate any portion of the said stock was allotted to the share of the said appellant, nor that the said 148 shares ever formed part of those belonging to the estate of the late John Molson, and that therefore the said 148 shares in the Molsons Bank are not subject to the said condition of *insaisissabilité* mentioned in the testator's will, and the contestation of the said appellant is unfounded in respect of said shares ;

"And considering that as regards the said lot of land No. 185 of the cadastral plan of the west ward of the city of Montreal, the sale made on the 15th of June, 1871, must be taken in connection with the *partage* of the estate of the late John Molson passed on the same day, and must be considered under the provisions of Art. 747 of the Civil Code as part and portion of the *partage* of the estate of the late John Molson, and that the said lot of land has not ceased to form part of that portion of the real estate of the estate of the said late John Molson which was allotted to the said appellant by the said *partage* ;

"And considering that the rents of the said

lot of land are, under the provision of the will of the said late John Molson and by virtue of Articles 558-632 of the Code of Civil Procedure, exempt from seizure (*insaisissables*) ;

"And considering that the appellant is by law authorized to invoke the nullity of the seizure made in this cause of the rents of the said lot of land ;

"And considering that it is unnecessary for the determination of the present contestation to enter into the examination of the other questions raised by the pleadings, and that there is error in that part of the judgment rendered by the Superior Court on the 30th of June 1881, in dismissing the contestation of the said appellant as regards the seizure in the hands of the said Allan Freeman of the rents of the said lot of land ;

"This Court reforming the said judgment of the 30th of June 1881, doth reject the contestation of the said appellant of the attachment made in the Molsons Bank as regards the 148 shares in the capital stock of the said bank by the said appellant held in the name of "*Alexander Molson in trust for A. A. M. et al.*" and doth declare the *saisie-arrest*, attachment made by the respondent in the hands of the Molsons Bank of the dividends accrued or to accrue on the said shares good and valid, and doth upon to declare what sums are or will become due to the appellant on the said shares ;

"And this Court doth maintain the contestation of the said appellant of the attachment made by the said respondent in the hands of the said Allan Freeman of the rents accrued and to accrue on the lease of the said lot of land No. 185, of the West ward of the city of Montreal, doth quash the said attachment, and doth grant *main levée* thereof ;

"And the Court doth condemn the appellant to pay to the respondent the costs incurred in the Court below on the attachment made in the hands of the Molsons Bank, and doth condemn the said respondent to pay to the appellant the costs incurred on the attachment in the hands of the said Allan Freeman and of the contestation thereof, as well as the costs on the present appeal."

In Nos. 432 and 433 the judgment was confirmed (Monk, J., dissenting), on the ground that appellant had not shown any interest in the sums of money attached in the cause.

Barnard, Beauchamp & Creighton for Appellant.
Abbott, Tait & Abbotts for Respondent.

S. Bethune, Q.C., and *Pagnuelo, Q.C.*, counsel for respondent.

* An appeal is pending before the Privy Council.

The Legal News.

VOL. VI. DECEMBER 1, 1883. No. 48.

THE COURT OF QUEEN'S BENCH AND ITS SITTINGS—LEGAL ARITHMETIC.

Mr. Geoffrion is reported to have said in answer to a *Gazette* reporter, after approving the four days system and disapproving of the term system: "I am strongly opposed to Judge Ramsay's suggestion, because, even with these two extra terms, we would really have fewer days for the hearing of cases than if the Court sat every day during the present regular terms."

Mr. Justice Cross seems to have communicated the same curious property of figures to a *Gazette* reporter in these words: "The proposition to adjourn for two days in the week will retard rather than facilitate exhausting the roll, because even with the additional two terms which the Government have proclaimed, if we adjourned for two days each week we would have at least four days less for the hearing of cases than with the present regular terms." In making a statement in Court on the 27th November, the Chief Justice said: "There was only one other remark he wished to make, and it was this: The regular terms between the 15th November and the vacation would have given 39 working days. The two additional terms proclaimed would give in all 58 working days. But the suggestion to sit four days in each week would only give 36 days from November to May."

Of course this could not be. But to leave no doubt as to the result of the two extra terms worked on the four days a week plan with the regular terms, here are the dates:

November 15 to 27	11 days of term
December 12 to 22*	10 " " "
In all.....	21 " " "
Subtract at rate of 2 dys per week.....	7 " " "
Leaves.....	14 as against 11

* The author of this luckless proclamation, if he intended to fix terms for December and February next, which is not said, has included a Sunday in express words, the 23rd December, the last day of the new term. Will the Judges be breaking the law of Quebec by keeping the law of Moses and its presumed substitute?

January 15 to 27 11 days.

February 15 to 27 11 "

In all 22 "

Off $\frac{1}{3}$ 7 $\frac{1}{3}$ 14 $\frac{2}{3}$ as against 11

Or taking the terms together 28 $\frac{2}{3}$ as against 22

The result of sitting four days a week during eight months of the year, that is six months in Montreal and two in Quebec, is easily ascertained. For Montreal,

Say 6 months..... 180 days.

Off 26 Sundays..... 26 "

154

Off $\frac{1}{3}$ 51 $\frac{1}{3}$ "

102 $\frac{2}{3}$ "

As against 5 terms of 11 days.... 55 "

Or a gain of..... 47 $\frac{1}{3}$

Of course the result at Quebec will be in proportion,

Say 2 months 60 days.

Off 9 Sundays..... 9 "

51

Off $\frac{1}{3}$ 17

34

As against 4 terms of 7 days..... 28

Or a gain of..... 6

It will be observed nothing is here allowed for holidays in either calculation, as it is evident this cannot alter them materially.

It will also be observed that the number of sitting days at Quebec is very slightly increased while at Montreal it is nearly doubled. The former may become insufficient, but unless there is an unexpected increase of business in Montreal it will not be necessary to have 102 days sittings in Montreal after the arrears have been cleared off, so that it will be the easiest of operations (if any operation is ever easy in the Court of Appeals) to adjust the matter between the two seats of the Court.

It will further be observed that four months are allowed for vacation, whereas three might suffice. It is, however, important that the judges of appeal should have ample vacation, which means leisure not holidays. In so close a programme as that suggested there will be difficult cases, and inflated ones, which cannot

be disposed of during the interim days, and consequently they will impinge on the vacation. There is also a quantity of work, unseen and unsuspected often, which a judge doing his duty has to perform. Again, we must not allow ourselves to be swept into the vulgar error of supposing that because a labouring man can work with his hands so many fixed hours a day, and almost every day in the year, therefore persons performing the higher intellectual work can do the same. There is this difference, a carpenter can lay down his saw or his plane and go to rest. A philosopher or a judge cannot command his brain to be still.

In another number I shall continue my remarks on this subject.

R.

WHICH IS IT?

Mr. Justice Cross is also reported to have said to the *Gazette* reporter: "We commenced this term with 116 cases, and at the end of the term probably not more than 20 will have been heard, which we can easily decide in a day or two after the term."

In his statement in Court on the 27th he is reported to have said: "As regards terms, he must say that his own feeling was that two days in the week were not sufficient for deliberation. He could not make up his mind in important cases in two days."

Both reasons may be bad; it is impossible to contend that both are good.

It appears that 17 cases have been heard and have not been adjudicated upon. The judges go to Quebec on Friday the 30th and they return on Saturday the 8th, and the Court reopens on the 12th. That is, the Judges will have four clear days all counted to deliberate on 17 cases forming a pile of printed matter seven inches thick. It may be hoped that no judge will attempt to make up his mind in all these cases in four days, for though his diligence and honesty may be above reproach, the results of his lucubrations will not be very valuable.

R.

THE NOVEMBER APPEAL TERM.

The Court of Queen's Bench sat during eleven juridical days, from the 15th to 27th November.

Besides disposing of motions and other applications the Court heard twenty-one cases on the merits. Two appeals were dismissed because the appellant was in default to proceed. Thus the roll, which comprised 116 cases, was reduced by 23 cases, leaving 93 cases unheard. Judgment was rendered on the 19th instant in six cases remaining over from September, and on the 27th in four cases heard during the present term. There are, therefore, 17 cases in which judgment stands over till December.

The above figures may serve as the basis of one or two remarks. It has been said that business would be advanced by the adoption of an hour rule for arguments, as in Louisiana. Without the prospect of some substantial advantage, it will not be contended that a tape measure is desirable in these matters; would there be any positive gain by its adoption? Let us see. The November Term, of eleven days, should comprise 55 hours' sitting. But the delivery of judgments consumed six hours, and the hearing of motions and other applications occupied at least four hours. Three hours were lost on one day by an adjournment, counsel not being ready to proceed. This reduced the time devoted to hearing arguments to 42 hours, for 21 cases, or precisely an hour to each side, including replies on the part of appellants.

No time, therefore, appears to have been lost under our elastic system, which leaves counsel unfettered in important cases, and does not encourage prolixity in trifling matters. If the hour rule were established, counsel would feel bound, more or less, to spread their argument over the sixty minutes in every case, more especially as clients often drop into Court to listen to the efforts of their advocates, and, every body being impressed with the importance of his own case, they might feel that justice was not being done to them, if the argument tell much within the hour.

MALICIOUS PROSECUTION OF SUIT.

In the case of *Boisclair & Lalancette* (5 Legal News, 266), the Court of Queen's Bench decided that there could be no action of damages based on something a party had done in a previous suit. Ramsay, J., remarked: "Had it not been for the decision in the case of *Gugy v. Brown*. I should have had no hesitation in saying that

there could be no suit on a suit, except to set aside judgments in specified cases, and this on the general principle that otherwise a legal difficulty might be made perpetual."

We are reminded of this case by one which came up lately in the Supreme Court of Pennsylvania, *Muldon v. Rickey*, March 22, 1883, 13 W. N. C. In this case it was held that no action lies to recover damages for the prosecution of a civil suit, however unfounded, where there has been no interference with either the person or property of the defendant. The Court said: "The action of ejectment temporarily clouds the title to the property in controversy, and so may, for the time, prevent a sale of, or mortgage upon it. But a damage of this kind is not more direct than that resulting from the expenses, loss of time, and often loss of credit, arising from the ordinary forms of legal controversy. All are troublesome, expensive, and often ruinous; and if for such damage the action of case could be maintained there would be no end of litigation, for the conclusion of one suit would be but the beginning of another. It has therefore been wisely determined, that for the prosecution of a civil suit, however unfounded, where there has been no interference with either the person or property of the defendant, no action will lie. In *Potts v. Imlay*, 1 South. 330, Chief Justice Kirkpatrick alleged that the books, for four hundred years back, had been searched to find an instance where an action on the case for the malicious prosecution of a civil suit, like the one then trying, had been successfully maintained; and that it was conceded by the counsel for the plaintiff that no such case had been found. He also, in this connection, cites with approval the case of *Parker v. Langley*, Gilb. Cases, 161, wherein it was said: 'An action on the case has not yet succeeded, but only where the plaintiff in the first suit made the course of the court requiring special bail a pretence for detaining another in prison, and where the malice was so specially charged, that it appeared that the end of the arrest was not the expectation of benefit to himself by a recovery, but a design of imprisoning the other.' And in the case of *Woodmanise v. Logan*, 1 Penning. 67, the learned judge expressed a doubt whether actions for malicious prosecutions, in civil cases, will lie at all. Our own cases, whilst they do not carry the doctrine

stated quite as far as those cited, do nevertheless confine actions of this kind to very narrow limits. Thus, it was held in *Kramer v. Stock*, 10 Watts, 115, that to sustain an action on the case for malicious prosecution, it was necessary that the party should have committed an illegal act, from which positive or implied damage ensued, but that to bring an action, though there was no good ground for it, was not such an illegal act. On the other hand, where one abuses legal process, as by maliciously holding one to bail, or wantonly levies an execution for a larger sum than is due, or after the payment of the debt, an action will lie against him, 'for these are illegal acts, and damage is thereby sustained.' Again, Mr. Justice Sharswood in the case of *Mayer v. Waller*, 14 P. F. S. 283, has without qualification declared, that a mere suit, however malicious or unfounded, cannot be made the ground of an action for damages. 'If,' says the learned justice, 'the person be not arrested, or his property seized, it is unimportant how futile and unfounded the action may be, as the plaintiff, in consideration of law, is punished by the payment of costs.' Then, again, we have the case of *Eberly v. Rupp*, 9 Nor. 259, the very latest expression of this court upon the subject in hand, and a case much stronger in its facts than the one under consideration, for there the action was for the recovery of damages resulting from the service of a writ of estrepement. But it was held that the action could not be maintained, inasmuch as the writ being purely preventive, neither arrested the person of the defendant nor seized his goods. It will also appear, upon an examination of the opinion in that case, that the point now under discussion is there met and disposed of. In opposition to this array of authorities the counsel for the defendant in error has produced nothing that can have weight with this court."

THE ADDITIONAL APPEAL TERMS.

The following observations were made by the Judges of the Queen's Bench at the opening of the Court on the 27th November:—

The Chief Justice said a proclamation had been issued on the 22nd of October last, fixing two additional terms of the Court of Appeals. This proclamation would be read and the Court

would adjourn to the 12th of December. The reason why this was done was that there was a little difficulty about the proclamation—it did not mention in what year the terms were to be held (laughter); in order that there might be no difficulty whatever, the Court had resolved to adjourn to the 12th of December next. The Chief Justice proceeded to observe that there had been a good deal of misrepresentation about these additional terms, and a good deal of discussion had been going on without it being known exactly what were the facts under which the terms were proclaimed. It would be recollected by the Bar that a bill had been introduced last year into the Legislative Assembly of Quebec for the purpose of doing away with the term system and arranging for the Court to sit almost continuously. That bill passed through the Legislative Assembly but did not pass the Legislative Council. Immediately after the session the Council of the Bar met and passed a resolution praying the Attorney General to fix a monthly term at Montreal, according to the promise which had been made by him during the session. The Attorney-General had sent him (the Chief Justice) a copy of this resolution with a request, not to express an opinion on the propriety of having additional terms, but that he should indicate the days on which the additional terms might be most conveniently fixed. He (the Chief Justice) communicated with his colleagues, and it appeared that no common action could be taken. He therefore took it upon himself to suggest to the Attorney-General what he thought should be done, that is, that no term should be fixed before the vacation (it was then the 23rd of June), but having calculated what he thought was the number of days necessary to get rid of the roll, or to reduce it so much as to bring it under the control of the Court, instead of five or six additional terms, as was suggested by the resolution of the Bar, he proposed that three additional terms should be fixed, one in October, one in December, and one in February, giving thirty additional working days. At the same time he took particular care to say this was to be considered as his own suggestion, and not that of any one else. He expressly stated that. Now, the Government had fixed two instead of three terms, omitting the term suggested to be held in October. They were

not to be blamed for that, for one of his colleagues had specially dissented from that, and the Government were informed of the fact. This statement showed how it came about that additional terms were fixed. He had nothing else to say. It was evident that it was at the suggestion of the Bar, or rather of the Council of the Bar, that the additional terms were fixed. There was only one other remark he wished to make, and it was this: The regular terms between the 15th November and the vacation would have given 39 working days. The two additional terms proclaimed would give in all 58 working days. But the suggestion to sit four days in each week would only give 36 days from November to May, that is, three days less than if there had been no extra terms. His Honor concluded by observing that he made these remarks so that the Bar might put the blame, if there was any blame, where it rests and not where it does not rest.

The proclamation was then read.

RAMSAY, J., said the remarks which the Chief Justice had made necessitated some observations from him. The Chief Justice stated that he communicated with him on this subject. He (Mr. Justice Ramsay) had no recollection of that, but he found no fault on that account, because communication with him would have been useless. It was well known to the bar that he had all along been opposed to any system that would prevent deliberation. It had been stated in certain quarters that he had approved of these extra terms: he had never approved of them, on the contrary, he had disapproved of them in the strongest manner. If the bar asked for a system by which the Court would have to sit perpetually, he could not understand on what ground it could be justified. It was in the recollection of the bar that seven or eight years ago they pressed upon the Government the plan of sitting four days in the week. He was no stickler for forms; the sittings might be called terms or otherwise; but he wished to perform his duty conscientiously and well, and he regretted that the Chief Justice had suggested these additional terms, because it was impossible that the work could be done. That was the view of the bar, for every man who had been consulted and who had furnished his views to the *Gazette*, agreed with the four days system. Only two judges

of the court had expressed a contrary view. If the bar asked for these additional sittings, they might just as well ask for a bit of the moon. No court in any part of the world was doing such work, and he did not think people here were more able to do it than elsewhere. The terms had been fixed against his will. It had been said that in refusing to sit he was disobeying the law, but this was not so. The power accorded to the Lt.-Governor to proclaim terms is a delegated power, and it is always understood that such a power is to be exercised in a usual and reasonable manner. Now this proclamation is totally unusual and unreasonable. He (Mr. Justice Ramsay) was not violating the law in refusing to sit; he was carrying it out. He was not going to rush into a vain effort to sit all the days of the week, because he could not do it. He concurred in the prudence of adjourning the court to the 12th, if the court desired to sit, because the proclamation was illegal, there being no date, and he did not wish it to be understood that, by joining in this resolution to adjourn, he concurred in the proclamation. He proposed to avail himself of the December sittings to deliver judgments, but he would not hear cases.

DORION, C.J. My principal object was to show that what I had seen in the papers—that Mr. Justice Ramsay, after approving of the additional terms had refused to sit—was incorrect.

CROSS, J., said the view he had taken of the terms was this: The terms were well placed, and the Court had power to adjourn for a day or two if necessary. But while there was a large number of cases in arrear it was wise to increase the working days either by adjournments or by additional terms. The Court ought to have done this of itself. As regards terms, he must say that his own feeling was that two days in the week were not sufficient for deliberation. He could not make up his mind in important cases in two days. The system of terms had long prevailed, and he did not like, for the sake of mere novelties, to depart from the old system which obtained in England and elsewhere. After all, the times of sitting had not much to do with the progress of business: it was merely shifting the days of work. He believed that the Privy Council sat almost continuously until the work was exhausted. Papers had been received lately from the Chief Justice in Louisiana, indicating the progress of business there. There were about one hundred cases at Shreveport, and they were despatched in about a fortnight. The Bar there consented to limit their arguments to one hour unless special application were made. It seemed to him that the Court had full power to sit on extra days, and he for one was well disposed to do this. In his view the Court should have adjourned of its own accord to convenient days for hearing arguments, and he had been of

the opinion that if they did not do this the Government would force it upon them and fix terms when they would be obliged to sit.

MONK, J., said he had not intended to make any remarks upon the difficulties which had arisen, but he thought it was due to the bar that he should make one or two observations. The Chief Justice communicated with him on the subject, and as he anticipated from the resolution of the Bar and from the proposed action of the Government that these terms were to be fixed, and as he had entire confidence in the Chief Justice, he said to him, "Whatever you think is proper, whatever the bar think is expedient, I am perfectly willing to agree to. Fix any days you please, and as many as you please, only don't let us come back during the holidays." He thought the arrangement which had been made was a good one, and that with a little good will they could do what was required of them. With respect to the four days in the week system, he had been decidedly of opinion and was still of opinion, that four days in the week were enough; it was about as much as the bar were equal to. But the majority of the Court were not of that opinion, and with perfect confidence in their judgment he bowed to their decision. He was perfectly willing to sit there every day, but he did not think it would be convenient for the bar. With a little energy and a little forbearance the work would no doubt be done—whether satisfactorily or not he did not know.

BABY, J., said when the Chief Justice consulted with him, he felt doubtful as to the possibility of undertaking so much. When the proclamation was issued making it imperative to sit from November to the end of March, he represented to this colleagues that the amount of work imposed on the Court was very considerable, and that if they were to do justice to the cases they should have more time for deliberation. With the best will in the world and the strongest desire to expedite the business of the Court, the judges were not machines, and there was a limit to their endurance. He had favored the four days system, but as the matter had been otherwise ordered, he bowed to the wish of the bar and the decision of the majority of the Court.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, Oct. 31, 1883.

DORION, C.J., MONK, RAMSAY, CROSS & BABY, JJ.

BEARD (def. below), Appellant, & MILLIKEN *vs* qual. (plff. below), Respondent.

Accession—C. O. 435.

Article 435 C. C. does not declare that the property of material belonging to another is transferred

to the workman when the added workmanship is so important that it greatly exceeds the value of the material employed. The workman has only the faculty of retaining the thing on paying the owner the price of the material, and thus becoming the owner.

The action was in revendication of 250 cords of shingle wood for cedar butts, valued at \$125.

The respondent, a lumber dealer, held under license from the Provincial Government certain lots in the third range, northeast of the township of Stratford, with the right of cutting timber growing thereon. In the winter of 1879-80, as he alleged, a quantity of cedar was cut by trespassers and brought to the appellant's mill, where it was partly converted into shingles. The respondent, on learning this, caused the timber to be seized.

The defence was that the shingle wood had been purchased in good faith.

The Court at Sherbrooke maintained the defence, and held that the timber had been cut by permission.

This decision was reversed by the Court of Review at Montreal and the action was maintained. It was from this judgment that the present appeal was taken.

RAMSAY, J. This is an action by way of *saisie-revendication* of certain wood cut on Government limits of which respondents, plaintiffs in the Court below, are the lessees. In first instance the action was dismissed; but in Review this judgment was reversed, and \$125 accorded as the value of the timber before it was manufactured into shingles.

Appellant's first proposition is this, there could be no revendication because the wood was manufactured into shingles, the labour was of greater value than the new material, and therefore the manufacturer became the owner. This is not the meaning of Art. 435, C. C. The rule of ownership is established by Art. 434, that the owner is he to whom the material belongs. If, however, the workmanship be so important as to exceed in value the material, the workman may invert the general rule, and make himself owner, by disinterestedly the proprietor by paying him the value of the material. Till that is done the owner remains owner of the manufactured article. The case of the *Paper Co. & B. Am. Land Co.* (5 L. N. 310) has a resemblance to this and no more. It was alleged that the appellant was in fraud, to give some consistency to the action; but the existence of fraud was the reverse of being proved, and the judgment of this Court going on the principle that *possession vaut titre*, held, that the defendants bought in good faith from a dealer in such an article—fire-wood from the owner of a bush lot—and had paid the price, and that they could not be obliged to pay again, much less to pay for the value of the fire-wood. As for the words referred to, they do not maintain the doctrine sought to be established by appellants,

namely, that the wood became defendants' by turning it into fire-wood or shingles; but only this, that as between the innocent third party and the Land Company the former could not be compelled to pay more than the value of the wood, for that the manufacturer in any case was entitled to the value of his workmanship.

Appellant's second proposition is somewhat different. He says the wood was cut by consent of the lessee, and consequently it was only a question of the value of the timber.

If this be true the revendication should have been discharged with the extra costs it entailed, and defendant been compelled to pay the value of the timber.

The Court of Review took a different view of the case and thought that the permission to cut was not proved, that the value of the timber was proved, and they condemned the appellant to pay this value and no more. He has suffered no wrong, except in a matter of costs, and I do not think we should disturb the judgment, even if we were of opinion that under the evidence the judgment might have been framed otherwise in this particular.

Judgment confirmed.

Hall, White & Panneton for appellant.

J. J. McLaren, counsel.

Camirand & Hurd for respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, November 27, 1883.

DORION, C.J., RAMSAY, TESSIER, CROSS & BABY, JJ.

LA CORPORATION DU COMTE D'OTTAWA (def. below), Appellant, and LA COMPAGNIE DU CHEMIN DE FER, M. O. & O., (plff. below), Respondent.

Damages—Default to give debentures.

The failure to pay money at the proper time can only give rise to the immediate and direct damages resulting therefrom, which are limited by law to the legal interest on the sum. But an obligation to give debentures bearing interest is not to be treated as a mere obligation to pay money, and nominal damages may be allowed for default, without proof of actual damages.

The appeal is from a judgment of the Superior Court, Torrance, J., reported in 5 Legal News, p. 132.

The action in the Court below was for the recovery of damages, under unusual circumstances.

The plaintiffs, now respondents (the Montreal, Ottawa, and Western Railway Company), set up that on the 12th of June, 1872, the defendants passed a by-law authorising them to take stock in the railway to the amount of \$200,000, and pay the same in bonds or debentures. On the 9th July, 1872, the by-law was adopted by the electors, and by 36 Vic., cap. 49, was declared valid. By this by-law the Mayor

of the Council subscribed the stock on the following, among other, conditions:—(1.) The amount should be payable in debentures of \$100 each, payable in 25 years. (2.) The subscription was only exigible as the work progressed, not to exceed 50 per cent. of the value of the work done, payments to be made monthly, as the work progressed, on the certificate of the Company's engineer. The plaintiffs further alleged that, conformably to the by-law, they commenced the works, and in March, 1875, had constructed to the value of more than \$300,000 on a length of fifty miles in the County of Ottawa; that this gave the Company the right to claim \$150,000 payable in debentures; that the plaintiffs were ready to terminate the work on condition that the defendants should fulfil the conditions of the by-law; that the defendants failed to pay to plaintiffs said debentures, and caused damage to plaintiffs, by shaking their credit and depriving them of considerable sums of money, which the plaintiffs would have had a right to, as well from the city of Montreal as from the Quebec Government. Damages were under these circumstances claimed.

The defence was to the effect that the defendants were not bound to deliver the debentures until the conditions were duly executed; that among the conditions was one that the road should be completed and in running order on 1st December, 1875; that the road could not be completed within that time, and that the plaintiffs were utterly insolvent; that the only claim the plaintiffs could legally make was for the issuing of the debentures or their value in money. There were some other points of lesser importance raised.

The Court below was of opinion that although as a general rule, in obligations limited to the payment of a sum of money, damages arising from delay in their fulfilment consist in a condemnation to pay interest, yet there may be cases in which the creditor is entitled to damages other than interest. There may be other causes of damage besides simple delay, and those fall under the general rule which allows the Court to assess the amount of damage according to the loss really sustained by the claimant. The Court accordingly allowed \$100 damages for default of defendants.

For the appellants it was contended that the obligation was to pay a sum of money, and there could not be other damages than the interest thereon. It was also submitted that the plaintiffs were completely disinterested, the Provincial Government of Quebec having acquired the road and all the right, title, and interest of the plaintiffs. Moreover there was no proof of damage.

For the respondents it was urged that the appellants were in a great measure responsible for the financial difficulties which had crushed the company in the autumn of 1875. The withholding by appellants of the amount due

by them led other corporations to withhold their subventions, and it was submitted that these damages were not too remote to be taken into account. The authorities sustained a right of action for damages apart from mere interest, and the amount which had been awarded by the Court below was the smallest sum that could be assessed.

RAMSAY, J. This appeal gives rise to a question of some interest and some novelty. The County of Ottawa agreed to take 200 shares in the stock of the company respondent, and to pay for them by debentures bearing interest at six per cent, on certain conditions. These conditions were complied with, but the company on demand refused to deliver the debentures.

This appears to have deranged the affairs of the company respondent and to have done the respondent great damage. The respondent sued the appellant in damages, and was met by a demurrer taking up the ground that this was an undertaking to pay money, and that the only damage for the delay in the payment of money was interest at the legal rate.

The demurrer was dismissed, we are not told why, but I think there is no difficulty in suggesting more than one good reason for its dismissal.

The whole question came up on the merits, and the learned Judge in the Court below awarded the respondent \$100 damages. In doing so he adopted a principle which was insisted on by the learned counsel for the respondent before this Court, and which he supported by a very respectable array of authority. It is this: that article 1077 C. C. only provides that the damages for the delay in the payment of money "consist only of interest," etc., "*ne consistent que dans l'intérêt*"—and that therefore there may be other damages for the non-payment of money. It is said this article is borrowed from Art. 1153, C. N., and that the writers under this article in France have held that there may be other damages than interest where money has not been paid. It is proper to remark that the *redaction* of 1153 C. N. is very different from that of Art. 1077 C. C. Art. 1153 is in these words: "*Dans les obligations qui se bornent au paiement d'une certaine somme, les dommages et intérêts, résultant du retard dans l'exécution, ne consistent jamais que dans la condamnation aux intérêts fixés par la loi.*"

I do not however attach much importance to this difference of *redaction*. It seems to me to establish a distinction almost inappreciable, and one which it is evident the codification commissioners did not see. They say, p. 18, 1st Rep. "The section intitled 'Of damages' resulting from the inexecution of obligations, contains articles numbered from 90 (96) to 98 (103), which, with some changes of expression and difference of arrangement, embody the rules contained in the articles of the French Code,

"numbered from 1145 to 1154, and declare the "existing law."

If I have understood the meaning of the French writers cited by respondent, it is this: that article 1153 C. N. limits the damages arising from the delay to pay money, to legal interest only when the obligation is limited to the payment of money, but that when the payment of money is portion of another substantive contract, then all the damages resulting indirectly from the delay can be exacted. This is ingenious but very forced, and it is absolutely inadmissible under the *redaction* of our article 1077. The opportunity of setting the legal mind astray on this question arises from the weakly pedantic and false doctrine of Article 1053 C. C. which is obviously incompatible with Articles 1074 and 1075 C. C. It is borrowed with variations from Arts. 1182 and 1183 C. N., which in their turn are even more forcibly in contradiction with Arts. 1150 and 1151 C. N. Whatever may be the origin of the idea which was expressed by the application of the three degrees of comparison to *culpa*, we have the advantage of knowing that 1053 C. C. was adopted to substitute a new basis for damages, under guise of re-asserting the true principles of law. 1st Rep. p. 18. How far the omission of the square brackets is justifiable it is not necessary now to enquire.

I am therefore of opinion that the failure to pay money at the proper time can only give rise to the immediate and direct damages resulting therefrom, and which are limited by law to the legal interest on the sum.

But the next question is whether the obligation to give debentures bearing interest at 6 p. c. is an obligation to pay money? Strictly speaking it is not, and I think we can hardly say it is an equivalent, as when commercial paper is given. Now the rule of Art. 1077 is one of positive law, and an exception to the general rule of Article 1073 C. C. If Art. 1073 had stood alone, and without Art. 1077, damages for the delay to pay money would have been the loss the creditor has sustained. I am therefore to confirm. I think these remarks dispose of the whole argument as presented at the bar, but a new view is presented by the dissent, which it becomes important to consider in order that it may not be supposed we have overlooked it.

Before doing so I would however remark that reference was made to what I said in *Ansell & The Bank of Toronto*; but it will be remembered that the judgment went on the merits, and that I only put as a query whether that case was not within Article 1077 as being equivalent to the payment of money.

I understand the argument of the learned Chief Justice to be this:

The damages sought to be recovered are specially for loss of credit, loss of prospective gains and interest, that on such a declaration no gen-

eral damages could be given, not even nominal damages, that there was no such thing as nominal damages in the French Law, that by that law all damages were real, and that the nominal damages of the English Law were a farthing or a shilling. It was further said that in England loose speculative opinions as to probable gains were considered as inconclusive and too remote. It was also said that there could be no damages by way of interest, for the action was taken out on the 19th June, and the *mise en demeure* to deliver the bonds was only on the 19th January, so that interest on the bonds was not due till July.

I quite agree with the Chief Justice that if the Civil Code is to be taken as embracing all the principles of damages known to the French law these damages are not sustainable; but it is evident that the articles on damages are miserably insufficient. I do not see how any one who has read Pothier and the old authors on the subject, can arrive at the conclusion, that there were no nominal or exemplary damages under the old French law when positive proof of loss was impossible. At all events it is pretty late in the day to set up such a doctrine, for we have been giving exemplary damages, damages estimated by the Court and nominal damages, ever since I have known anything of the matter. I never heard the right questioned before, except by a once well known litigant who made it a charge against Judge Aylwin that he had given some small damages as recognitive of the right of action although no real damage was positively proved. I don't think the criticism produced much impression. If nominal damages can only be a farthing or a shilling then nominal damages for personal wrongs cannot carry costs (478 C. C. P.) If again these debentures are considered as money or equivalent to money, what has been allowed, \$100, is far less than the interest on \$112,000 from 17th January to 19th June. To say that interest *as damages*, could not be due because the interest on the debentures was not due till July appears to me as a fallacy. The interest on the debentures could never be due, because they never were issued. Our article only says that interest is the measure of damage for non-payment of money. It does not surely mean that the damage may not be asked for with the demand. It has also been said that if the judgment is good it is for too little. That is hardly a ground of appeal in the mouth of the party condemned. It seems to me that the judgment is highly equitable and just, and is perfectly in accordance with the law, and that is the opinion of the majority of the Court. The appeal will therefore be dismissed with costs.

DORION, C. J., and CROSS, J., dissented.

Judgment confirmed.

Laflamme, Huntington & Laflamme, for appellant.

DeBellefeuille & Bonin, for respondent.

The Legal News.

VOL. VI. DECEMBER 8, 1883. No. 49.

INTEREST ON COUPONS.

A question of some importance was decided in *Desrosiers v. Montreal, Portland & Boston Ry. Co.*, by the Court of Review at Montreal on the 30th ultimo. The Court unanimously overruled that part of the decision of the Court below which disallowed interest on railway coupons from the date of maturity. The coupons themselves represent interest on railway bonds, and the question was whether, in the absence of any formal demand, the holder was entitled to interest on the amount of each coupon from the date of maturity. The Judge of first instance ruled that he was not, but this decision has been unanimously reversed by the three judges sitting in Review, (Johnson, Torrance and Rainville, J.J.) It appears that the Judge of first instance was misled in part by a citation from Abbott's Digest, the text of which was not supported by the decisions on which it purported to be based. The Supreme Court of the United States, in a series of decisions, has laid down the doctrine that interest runs from the date of maturity of each coupon. The latest case is *Walnut v. Wade*, 103 U. S. Supreme Court Rep., p. 683. In that case reference was made to the previous decision by the same Court in *Aurora City v. West*, 7 Wallace, p. 82, as well as several other judgments of later date, all of which treated coupons as negotiable instruments, bearing interest from date of maturity.

This question was decided incidentally in the same sense by Mr. Justice Torrance in the case of *Hatton v. Senecal*, 6 Legal News, p. 220. Although the point does not appear to have been specially discussed in that case, the text of the judgment (p. 222) shows that the learned Judge granted the prayer of the plaintiff asking for interest on each coupon from the date when the same became due. It is to be remarked, however, that the action was not against the company, but against a person who unlawfully retained the debentures and coupons, and thereby prevented the plaintiff from making a formal demand for payment of the coupons as they fell due. This case is now in appeal.

We remember that the same question was

raised some years ago in the Superior Court in a case of *Macdougall v. Montreal Warehousing Co.*, of which a short note will be found in 3 Legal News, p. 64. Mr. Justice Mackay in that case did not think that our law sustains the demand for interest where the debtor is not put in mora.

THE MONTREAL COURT HOUSE.

We are glad that Mr. Justice Johnson, in some pointed remarks, on the 30th ult., has drawn attention to the disgraceful condition of the Court House in Montreal. The bulk of the judicial business of the Province is transacted in this building, and a golden rain of fees extracted from the pockets of suitors falls upon the thirsty provincial exchequer, yet the accommodation afforded to the judges and to the bar is as remote from what health and convenience require as can possibly be conceived. The atmosphere within the building during the month of November was loathsome and oppressive to a degree which we have never known paralleled during an experience of nearly a quarter of a century. This is due partly to the holding of the Criminal Court, the Circuit Court, and the Election Courts under the same roof. Chief Justice Dorion drew attention to this grave inconvenience some months ago (see p. 193 of this volume). The Criminal Court, with the Police and Session Courts, and probably the Circuit Court, should be transferred to a detached building, and this would leave space enough for the Superior Courts for twenty years to come. Apart from this overcrowding, we suffer from the ignorance or stupidity of those in charge of the building. A little more attention to ventilation would do much to diminish the evil effects of the poisonous atmosphere. We have a strong impression that the exhaustion of Court House work is due as much or more to the foul air breathed there as to the intellectual fatigue actually undergone. It is to be hoped that the Council of the Bar will follow up the suggestion of the Judges, but it will take a great many knocks from the judicial and legal hammers to drive the nail home.

MALICIOUS PROSECUTION OF SUIT.

The *Albany Law Journal* (Vol. 28, p. 304) has collated some authorities on this question, (*ante*, p. 378) which may be interesting. It refers to *Closson v. Staples*, 42 Vt. 209; S. C., 1

Am. Rep. 316, and adds: Counsel also cited *Page v. Cushing*, 38 Mo. 523; *Cox v. Taylor's Adm'r*, 10 B. Monr. 17. Cooley approves the present doctrine, Torts, 187, 188. Underhill (Torts, 99) lays down the same doctrine. Mr. Moak considers his definition defective because it "does not include an ordinary civil suit," and cites Cooley on Torts, 180; but on examination it will be found that Judge Cooley limits his remarks at that place to criminal proceedings (p. 181), and afterwards says: "There is much good reason in what has been said in a Pennsylvania case"—*Mayer v. Waller*, *supra*—"that 'if the person be not arrested, or his property seized, it is unimportant how futile and unfounded the action might be; as the plaintiff, in consideration of law, is punished by the payment of costs.' If every suit may be retried on allegation of malice, the evil would be intolerable, and the malice in each subsequent suit would be likely to be greater than in the first."

To the same effect, in *Potts v. Inlay*, *supra*, the court said: "The courts of law are open to every citizen, and he may sue, *toties quoties*, upon the penalty of lawful costs only. These are considered as a sufficient compensation for the mere expenses of the defendant in his defence. They are given to him for this purpose, and he cannot rise up in a court of justice and say the Legislature have not given him enough." "Merely for the expenses of a civil suit, however malicious and however groundless, this action does not lie, nor ever did so far as I can find, at any period of our judicial history. It must be attended, besides ordinary expenses, with other special grievance or damage, not necessarily incident to a defence, but superadded to it by the malice and contrivance of the defendant; and of these an arrest seems to be the only one spoken of in our books."

And in *McNamee v. Mink*, 49 Md. 122, it was held that an action is not maintainable for a false and malicious prosecution of an ordinary action of ejectment wherein the plaintiff failed to recover all that he claimed, and that such action is generally maintainable only where there has been an alleged malicious arrest of the person, or a groundless and malicious seizure of property, or the false and malicious placing the plaintiff in bankruptcy, or the like. The court said: "It is true, a party may be held liable for a false and malicious prosecution of either a

criminal or civil proceeding; but when it has been attempted to hold a party liable for the prosecution of a civil proceeding, it has generally been in cases where there has been an alleged malicious arrest of the person, as in the case of *Turner v. Walker*, 3 Gill & Johns. 377, or a groundless and malicious seizure of property, or the false and malicious placing the plaintiff in bankruptcy, or the like. In the case of *Goslin v. Wilcox*, 2 Wils. 302, which was an action for a malicious prosecution of a civil proceeding wherein the party was arrested, it was said by Lord Camden, C.J., that 'there are no cases in the old books, of actions for suing where the plaintiff had no cause of action; but of late years, when a man is maliciously held to bail, where nothing is owing, or when he is maliciously arrested for a great deal more than is due, this action has been held to lie, because the costs in the cause are not sufficient satisfaction for imprisoning a man unjustly, and putting him to the difficulty of getting bail for a larger sum than is due.' But there is a clear and well defined distinction between the actions for a false and malicious prosecution of a civil proceeding, and a false and malicious prosecution of a criminal proceeding. This distinction is stated in 1 Bac. Abr., tit. Action on the Case (H) page 141, where it is said: 'But it must be observed, that there is a great difference between a false and malicious prosecution by way of indictment, and bringing a civil action; for in the latter, the plaintiff asserts a right, and shall be amerced *pro falso clamore*; also the defendant is entitled to his costs; and therefore for commencing such an action, though without sufficient grounds, no action on the case lies.' For this the author cites Salk. 14; 3 Lev. 210; Hob. 266; 3 Leon. 138 and Cro. Jac. 432. But if the plaintiff declares that he has been falsely and maliciously arrested, or that by reason of a false claim maliciously asserted by the defendant, he was required to give bail, and upon failure he was detained in custody, or his property was attached, there the action lies, because of the special damage sustained by the plaintiff. It is not enough however for the plaintiff to declare generally that the defendant brought an action against him *ex malitia et sine causa*, *per quod* he put him to great charge, etc.; but he must allege and show the grievance specially.

Savil v. Roberts, 1 Salk. 13, 14; S. C., Ld. Raym. 374; *Goslin v. Wilcox*, 2 Wils. 305 and 306; Add. on Torts (3d Eng. ed.), 599; 4 Rob. Prac. 670; 671. Otherwise, parties would be constantly involved in litigation, trying over cases that may have failed, upon the mere allegation of false and malicious prosecution."

On the other hand, *Whipple v. Fuller*, 11 Conn. 581, it was held that if an action is brought and prosecuted maliciously and without probable cause, so that the defendant suffers damage, an action of malicious prosecution lies, although there was no arrest nor attachment.

That doctrine and decision were followed in *Woods v. Finnell*, 13 Bush, 628. The court said: "After the statute giving costs to the defendant, it was held by the common-law courts that no action could be maintained on account of the institution and prosecution of a civil action without probable cause, and therefore no action could lie for a vexatious ejection. In all such cases the plaintiff must have gone beyond the proper remedy for the enforcement of his claim, such as procuring an illegal order of arrest, or requiring excessive bail before the action could be maintained. This entire doctrine is based on the idea that the plaintiff bringing the action is sufficiently punished, and the defendant fully recompensed by the statute requiring the plaintiff to pay all the costs. We perceive no good reason for following this rule, and denying to the defendant a remedy when his damages exceed the ordinary costs of the action. The fact that a plaintiff has been subjected to the payment of costs *pro falso clamore*, is no recompense to the defendant when the latter has, by reason of the malicious proceeding on the part of the plaintiff, sustained damage. In cases where the plaintiff has mistaken his action, or been nonsuited, or where, by reason of some imaginary claim, he has seen proper to sue the defendant, it is not pretended that any action for damages can be maintained; but where the claim is not only false, but the action is prompted alone by malice and without any probable cause, the defendant's right of recovery, for the expenses incurred and damages sustained, should be as fully recognised as if his property had been attached or his body taken charge of by the sheriff. While the damages may be less in the one case than the other the legal right

exists and some remedy should be afforded. If the facts alleged in these petitions are true, and they must be so treated on demurrer, it would be a singular system of jurisprudence that would admit the wrong and still withhold the remedy. * * * Following the doctrine of the common law, *that for every injury there is a remedy*, we see no reason for denying a remedy to the plaintiffs in each of these cases; and where a party seeks a judicial tribunal for the purpose alone of gratifying his malice he should be made to recompense the party injured for the damages actually sustained, and the court should see that a remedy is afforded for that purpose."

The same doctrine was adopted in *Marbourn v. Smith*, 11 Kans. 554, where the malicious prosecution was for slander. The court said: "We suppose the only question of law arising upon the last assignment of error is, whether an action for malicious prosecution can be maintained in a case like the one at bar where neither the person nor property was seized nor bail nor security required, and the ordinary costs of defending the alleged malicious prosecution have already been allowed. Our opinion upon this question has already been foreshadowed. We suppose that an action for malicious prosecution can be maintained in any case where a malicious prosecution, without probable cause, has in fact been had and determined, and the defendant in such prosecution has sustained damage over and above his taxable costs in the case. *Whipple v. Fuller*, 11 Conn. 581; *Classon v. Staple*, 42 Vt. 209; S. C., 1 Am. Rep. 316. *Pangburn v. Ball*, 1 Wend. 345. At common law the defendant in such a case always has a remedy. Originally it was an action for malicious prosecution. Subsequently it was amendment of the plaintiff *pro falso clamore*. But now and in this State, as amendment is abolished, the defendant must return to his original remedy of malicious prosecution. It is an old maxim that there can be no legal right without a remedy. And the legal right in such a case has always been recognized. Indeed, it would be strange if the defendants in the case we have heretofore supposed while discussing the second and third assignments of errors should have no remedy."

In *Classon v. Staple*, *supra*, the court say: "But where the damages sustained by the

defendant in defending a suit maliciously prosecuted without reasonable or probable cause exceed the costs obtained by him, he has and of right should have a remedy by action on the case."

It seems that the doctrine of the principal case is heavily overborne by the weight of modern authority.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, November 19, 1883.

DORION, C.J., RAMSAY, TESSIER, CROSS & BABY, JJ.

PANGMAN, Appellant, and BUCHANAN, Respondent.

Procedure—Contestation of report of distribution—Security in Appeal.

On an appeal from a judgment dismissing the contestation of a report of distribution, the contestant is obliged to give security for costs only.

The appellant, creditor collocated, contested the privilege of the respondent, another collocated creditor. The contestation was dismissed in the Court below. He now appealed and gave security for costs only, fixed by the prothonotary at \$150.

The respondent moved to reject the appeal, because the security was insufficient.

The COURT dismissed the motion, but without costs, because the word damages had been struck out of the security bond.

De Bellefeuille & Bonin for appellant.

Archambault & Archambault for respondent.

COURT OF REVIEW.

MONTREAL, November 30, 1883.

JOHNSON, TORRANCE, RAINVILLE, JJ.

DESROSNIERS v. THE MONTREAL, PORTLAND & BOSTON RY. CO.

Coupons of Railway Bonds—Interest.

Interest runs on the interest coupons of railway debentures from the dates on which they respectively fall due, without the necessity of putting the debtor en demeure.

The judgment inscribed in Review was rendered by the Superior Court, Montreal, Doherty, J., July 5, 1883.

JOHNSON, J. The only question here (and a sufficiently important one) is whether the coupons, representing interest on certain railway debentures—themselves bear interest without a demand for payment. Judgment was given for the amount of the coupons, but without interest, and it is the latter part of this judgment refusing the \$513 interest accrued since the coupons became due, that is now before us. It is said for the defendant that the coupons themselves represent interest on the bonds. That may be; but they are nevertheless, each of them, a negotiable instrument payable on a certain day which has elapsed; and there can be no doubt as to our own law applicable to such facts. Art. 1069 C. C. puts the debtor in mora by the sole expiration of the term of payment; and if he had any defence to make, it could only be, under Art. 2323, by showing that he had the funds ready. I am told that two cases have already been decided in this sense by this Court; but I am not acquainted with them. Daniel on Negotiable Instruments, Vol. 2, Nos. 1490, 1493, 1500, 1505, 1513, and 1514, cited at the bar, place the matter beyond doubt, and the error of the judgment complained of arose from taking the text of a digest as law, while the cases relied on in the digest were the other way. We therefore reverse the latter part of this judgment, and allow the interest since the date of the maturity of these instruments.

Judgment reversed.

Béique & Co., for plaintiff.

Loneragan, for defendant.

COURT OF REVIEW.

MONTREAL, November 30, 1883.

TORRANCE, DOHERTY & RAINVILLE, JJ.

MCDONALD v. DILLON.

Prescription—Loan—Evidence.

The five years' prescription does not apply to a loan not of a commercial nature. If the bond or note given in acknowledgment of such loan be prescribed, it cannot serve as proof of the debt, but the claim may nevertheless be established by other evidence.

The judgment inscribed in Review was rendered by the Superior Court, Montreal, Tasche-reau, J., Sept. 7, 1883, (6 Legal News, p. 291).

TORRANCE, J. This is an action to recover a loan of \$100 made to the defendant in 1867.

Defendant denied the loan, and alleged that the only claim which the plaintiff could have against him was for a *bon* of date 26th November, 1867, which was prescribed. The plea was overruled. The proof was that the defendant had borrowed the money. The authorities are clear that the prescription would not apply to the loan. The leading case is *Wishaw & Gilmour*, 6 L. C. J. 319, and the last case was that of *Robitaille v. Dénéchaud*, 5 Q. L. R. 238, where the earlier cases are cited.

Judgment confirmed.

D. E. Bowie for plaintiff.

J. L. Morris, counsel.

Duhamel & Rainville for defendant.

SUPERIOR COURT.

MONTREAL, November 30, 1883.

Before JOHNSON, J.

BROUSSEAU v. SEYBOLD *et al.*

Capias—Affidavit—"Intent to defraud"—Probable cause.

Held, following Shaw v. McKenzie, (6 *Supreme Court Rep.* 181), that the fact that the debtor is leaving the province is not of itself evidence of an intent to defraud, but the affidavit for *capias* must contain reasons sufficient to satisfy the court that the plaintiff had reasonable and probable cause to believe that the debtor was actually about to leave with a fraudulent intent. If sufficient reasons are not set forth and proved, and the *capias* is shown to have issued improperly, the defendant is entitled to damages.

PER CURIAM. The well-worn and ever recurring question as to what is sufficient probable cause for arresting a debtor about to leave the Province without paying his creditor is once more presented in this case. I decline to be for ever repeating what I have so often said in these cases. I shall merely observe that the law, as I understand it to be now settled upon this point by the more recent decisions is not what it was under the old 25 Geo. III.,—a law which enables creditors to keep their debtors within the jurisdiction of the Court, irrespectively of their means to pay, or of their honest or dishonest motives for leaving their creditors in the lurch; but it is a law which, since the passing of the 12 Vic., c. 41, requires, before you can arrest your debtor, that there should be

an "intent to defraud" on the part of the debtor leaving. I refer simply on this head to the well known cases of *Hurtubise v. Bourret*, and *Henderson v. Duggan*. What is, and what is not, an intent to defraud is a question of fact which will of course present itself differently to different minds. In the case of *Shaw v. McKenzie* there could be no doubt of the trickery and dishonesty of the debtor in postponing wantonly and indefinitely the payment of his debt, which seemed to me to imply not only a clear intent to defraud; but also something worse—an intent to injure and embarrass, and possibly to ruin—yet those circumstances, though beyond doubt of themselves, were subsequently held by better judges of commercial uprightness than I pretend to be—not to constitute the "intent to defraud." So that we are brought down clearly to the point of saying that you cannot arrest a man who is leaving the country merely because he has not the means to pay you; nor yet because he is tricky and dishonest, or postpones or evades payment; nor yet because the plain consequence of his conduct is to prevent you from ever getting a half-penny of your debt, as far as can be reasonably foreseen; you can't touch him so long as there is a distant possibility of his return, (of which he alone is the arbiter); you can't say there is an "intent to defraud," as long as he can reply, (truly or not does not matter), that he will get rich some day, and come back and pay you. Now, I don't say that this is my individual opinion—on the contrary, it is the reverse of my individual opinion; but it is incontestably the doctrine resulting from the decisions of *Hurtubise v. Bourret*, *Henderson v. Duggan*, and *Shaw v. McKenzie*. I concur, of course, with these cases in saying there must be the "intent to defraud"; but I fear it is too late in the day for me to alter my notions of what is fraud and what is plain dealing. I feel the more difficulty in yielding to the modern notions of "intent to defraud," when I refer to such cases (both of them since the passing of the 12 Vic., c. 41,) as *Wilson v. Reid*, and *Berry v. Dixon*, reported in 4 L.C.R., where the debtors were seafaring men going to leave in their ships, and that fact alone was held sufficient evidence of fraudulent intention. In both of those cases the question was as to the sufficiency of the affidavit. The fact was the going over the sea: and in both, that fact alone

was held sufficient evidence of the intent. In the last case, Caron, J., said: "It is discretionary with the judge to say whether the affidavit contains sufficient evidence of a fraudulent intention. I am of opinion there is enough to establish it. This is a commercial case, and the discretionary power of the Court ought to be exercised for the protection of trade." In the same case Chief Justice Duval said, although he also laid stress on the fact of the debtor being a stranger without property in the country, and who was going to leave without any certainty of his ever returning,— "In one word, either the defendant has means of paying, or he has not. In either case, he commits a fraud when he refuses to pay. If he has the money, it is a fraud to refuse payment; if not, he has got goods under a promise to pay which he cannot fulfil, and he is going to leave the Province without giving security." I admit there is a sound distinction to be taken, as to the intent to defraud, between persons who have property in the country, and persons who have not. I don't mean to say that the law (as I once heard it put) makes an invidious distinction between rich and poor, but it certainly sees and applies a distinction of common sense between a man who has thousands of pounds worth of property in this country to pay all his debts ten times over, and one who has nothing—as regards their right to leave the jurisdiction, and whatever it may say in the case of the poor man, it reasonably concludes that mere absence can't defraud a man's creditors if he leaves behind him plenty of means to pay; but nothing of that sort applies in this case, or applied in the case of *Shaw v. McKenzie*. If a man leaving no property behind him to pay his debts, says to his creditor, I am going to leave the country, and I will pay you or not just as, and when, I choose, it has been said that it would not show an intent to defraud; certainly it is not an avowal of such intent in so many words. He does not say, I am going to defraud you; but it is an avowal that he intends to exercise the option of defrauding you or not at his pleasure, and if he can do that under the law, and escape arrest, the law would seem to require amendment. These are the principles which have always guided me in endeavoring to ascertain the intent to defraud, which must be alleged and reasonable grounds shown for it—before arresting

a debtor who is leaving the country. But I should only be doing an injury to the defendant here if I acted on my individual views against the prevalent notions as expressed in the cases of *Hurtubise v. Bourret*, *Henderson v. Duggan*, and *Shaw v. McKenzie*. Therefore, I apply the law, as I find it in those decisions, to the present case; and upon the evidence I say it appears that the debtor, the present plaintiff, was arrested. The affidavit insufficiently alleged the intent to defraud; and he was discharged. The intent to defraud, if it exists, of course could be shown now under the defendant's plea, which says he had probable cause for issuing the capias—whether he sufficiently alleged it in his affidavit or not; but under the decisions I am bound by, the intent is not sufficiently shown. There is only the intent to leave, and to take upon himself the duty of saying whether he would ever come back, or ever pay his debts: and this, we have seen, is not sufficient under the recent cases. When it comes to damages, however, the Court has something to say. This man was arrested and went to jail, and was liberated on his petition; but he cannot put forward the length of his incarceration—which was of his own choosing—before he petitioned to get out, as an aggravation of damage. The conduct of this debtor towards his creditor was as dishonest as it well could be, (I say it of course subject to correction). I only mean to speak of what I consider honesty. He ought not to make money out of a creditor whom he cannot or will not pay; but there is the legal cause of action according to the decisions. There is the arrest, without the proof of intent to defraud—which proof the defendant took upon himself by his plea; and estimating the damages, as a jury would, I give \$20 with costs of action as brought.

Judgment for plaintiff.

Augé & Lafortune, for the plaintiff.

Church, Chapleau, Hall & Atwater, for the defendants.

CIRCUIT COURT.

MONTREAL, November, 1883.

Before RAINVILLE, J.

THE VICTORIA MUTUAL FIRE INSURANCE COMPANY
v. MULLIN.

Mutual Insurance Company—Insurance Act of 1877.

The action was brought to recover the amount of assessment due upon a premium note.

The defendant pleaded that since the passing of the Dominion Insurance Act of 1877, Mutual Fire Insurance Companies having their head office in the Province of Ontario had no right to do business in the Province of Quebec.

The Court held that the Company plaintiff, having its head quarters in the City of Hamilton, Ontario, and doing business in the Province of Quebec previous to 1877, had a right to do business in this Province since. The action was therefore maintained.

W. S. Walker, for plaintiff.

Pagnuelo & St. Jean, for defendant.

THE MONTREAL COURT HOUSE.

On taking his seat on the bench, on the 30th November, Hon. Mr. Justice Johnson remarked: It has been mentioned among the members of the bench, and I think it will be recognized as a fact by the profession, that there is a great want of accommodation in the Court House. During the present month it occurred upon more than one occasion that I was called upon by gentlemen of the bar to hear certain cases, the judge sitting at *enquôte* being otherwise occupied. It happened that I had nothing to do, that is to say, with the exception of *délibérés* from which we are never entirely free—and I was ready and desirous to hear these cases in the discharge of my duty, but there was not a hole or corner of the building in which I could sit. Now we want the Government to provide us with one or two additional rooms. It is most desirable that cases should be proceeded with when there are judges at liberty to sit, but it is impossible under the present conditions of the building. We want the corporation of the bar to ask the Government to give us the accommodation so necessary to the despatch of business. There is one thing that ought not to be lost sight of—the discipline and order of the Court House are at the present moment of the lowest description. The entrance is through a burrow, stinking of soup. Then one meets a crowd—I don't wish to say anything offensive—but it is often a mere rabble, in attendance on the Circuit Court: they spit, they talk, they make a noise. One of the first things to be done is to get rid of the Circuit Court—to get it out of the building altogether and give us the room which is now occupied by that Court. The re-

marks about the Circuit Court apply also to the room used for *enquêtes*. If this work could be transferred to another building it would facilitate us very much. As we are at present situated the public can hardly get justice. It is not fair—I will not say to the Judges—but to a respectable profession, that they should have to struggle with a rabble in order to get up the staircase, and then have to witness the scenes which are transpiring in the Circuit Court and in the *enquôte* room. I trust some plan may be devised, either by annexing the adjoining building, and having a covered way between, or by some other method, for giving us the additional accommodation so urgently needed.

PECULIAR LEGISLATION.

Physicians in Kansas must be careful how they prescribe beer, and how they take their own prescriptions. *State v. Curtis*, 29 Kans. 384, was a conviction under the statute for prescribing intoxicating liquors, to wit: two bottles of beer, in a case where there was no actual sickness and no necessity for such liquors. The court said: "It is testified that the witness Blau, for whom the prescription was made went to the defendant and claimed that he was sick. The defendant made an examination, and prescribed the beer. The defendant testified that he acted in good faith, believed that the beer was the proper remedy, and so believing, prescribed it. Now it seems to us that upon the testimony the only real question was the good faith of the defendant; and in respect to this it appears that the witness Blau had been in the habit of drinking beer in moderate quantities for several years; that he had had none for many days, and that he went to the defendant and told him that he wanted him to prescribe two bottles of beer, and the defendant gave him the prescription. He told the defendant wherein he was feeling badly; that he thought he needed beer, and the defendant agreed to it. After getting the beer he took the bottle back to the office of the defendant, and was invited by him to go and eat some oysters. He accepted the invitation, and the two went to a bakery near by and got some oysters, taking with them two bottles of beer, of which each drank one. Whether these bottles were the two which he obtained on this prescription, or

two furnished by the defendant, may not be certain; for it appears that two or three hours before getting this beer he had taken a prescription from defendant to the same ph obtained for him four bottles of beer, and it may be that the beer which was drunk was a part of the beer then obtained. It also appears that the defendant and the witness after eating the oysters and drinking the beer, attended a party, remained there awhile, and then returned to the office of the defendant and stayed there until ten or eleven o'clock, and then the witness went home. It does not appear that the witness was confined to his house at any time, or disabled from attending to his ordinary business. Upon this testimony, as we have said, we think the only substantial question for the jury was whether the defendant was acting in good faith, and made the prescription in the honest belief that the witness was sick and needed the remedy prescribed, or was seeking simply to enable a habitual drinker to continue his regular potations. We do not think that it can be held that upon this testimony the jury were bound to acquit."—*Albany Law Journal*.

GENERAL NOTES.

A divorce suit was brought recently in the Shasta Court, the complaint made out, service acknowledged, and decree of divorce entered up, all within a space of two hours. Beats Chicago.—*Pacific Coast Law Journal*.

The Law Times (London) says: "It is satisfactory to know that his American observations have not inspired Lord Coleridge with any desire for further drastic legal reforms. The Master of the Rolls announced at the Mansion House that nothing of the sort is to be immediately apprehended. Great as are the arrears in the English Court of Appeal, he said those in America are three times greater. It may therefore be hoped that procedure will be left alone for the present."

APPOINTMENTS.—The Honorable Featherston Osler, a Judge of the Supreme Court of Judicature of Ontario, a Justice of the High Court of Justice for Ontario and a member of the Common Pleas Division of the said High Court, has been gazetted (Nov. 17) to be a Judge of the Court of Appeal for Ontario with the title of Justice of Appeal. Mr. Justice Osler's place has been filled by the appointment of Mr. John E. Rose, Q. C. The Hon. John O'Connor, Q. C., has been appointed one of the Commissioners to consolidate and revise the Statutes of Canada, vice James Cockburn, Esq., deceased. C. R. Horne, Judge of the county court of the county of Essex, has been appointed Surrogate Judge of the Maritime Court of Ontario.

It is curious to note (says a well informed correspondent in Newfoundland) how the government of the eastern coast of Labrador has been tossed about between Canada and Newfoundland. While Canada was held by France, extensive fisheries were carried on by the French on the Labrador Coast, near the Straits of Belle Isle, to which they attached great importance. After the conquest of Canada by Britain, a company established in Quebec obtained a monopoly of these fisheries which lasted for sixty years. Until 1763 the fisheries of the whole southern and eastern shores of Labrador were placed under the Government of Quebec, but at that date the east coast of Labrador was annexed to Newfoundland. Ten years later, in 1773, it was considered advisable to restore this portion of Labrador to Canada, owing to difficulties arising out of grants made to a number of persons under the rule of the French. In 1809, it was again transferred to the jurisdiction of Newfoundland under which it has remained ever since. A special court of civil and criminal jurisdiction, called "The Court of Labrador" and presided over by one judge, appointed by the Governor in Council, secures the administration of justice.

An interesting case has been decided in the Brooklyn, N. Y., courts. Mr. James claims to be a spiritual medium, and was backed in his pretensions by Mr. Jonathan M. Roberts, the publisher of a journal called *Mind and Matter*. A *séance* was held, at which Messrs. W. R. and T. S. Tice were present. Mr. James was about entering the cabinet, when the brothers Tice seized him by the lappels of his coat and out tumbled wigs, beards, masks, white drapery, and angels' wings. The brothers Tice denounced the medium as a fraud, whereupon the *Mind and Matter* published a series of libellous articles respecting the detectors of the palpable impostor. An action was brought for libel, and in the course of the trial it was contended that spirits required the medium to have a supply of earthly garments on hand out of which to manufacture heavenly vestments. These robes would be necessarily very thin, and the jury thought that the explanation partook of the same quality, and returned a verdict for the plaintiffs for \$6,000.

The proceedings in an Arizona court were disturbed by a little incident the other day. The press dispatch says:—While Chief Justice French was hearing the case of *Kelley v. McAtee* regarding water rights, Attorney-General Churchill and District Attorney Ruoh had an excited discussion and came to blows. McAtee drew a knife and rushed upon a man named Moore, aged 70, and stabbed him fatally, and then stabbed C. W. Beach, late editor of the *Prescott Miner*, in the neck. He then made a rush for the court reporter, and was about to plunge the knife into him when Beach shot him through the spinal column. Order was finally restored." Court and counsel are not likely to sleep so long as the monotony of the proceedings is relieved by playful scenes like the above. Two men murdered and one stabbed in the neck, not to mention the imminent peril of the court reporter—makes a fair record for one day. However, the court is to be congratulated on the restoration of "order."

The Legal News.

VOL. VI. DECEMBER 15, 1883. No. 50.

THE COURT OF QUEEN'S BENCH AND ITS SITTINGS.—SENTIMENTAL AND OTHER VIEWS.

In the issue of 1st December an endeavour was made to show practically the working of the four days' rule—the word system is purposely avoided, as it seems to wound certain susceptibilities, and its use might afford excuse for digression. It was also sought to establish the recondite truth that the greater the fraction the less the quantity, or that a third is less than a half.

The *Gazette* interviews have been useful in letting us know who are in favour of the four days' rule, whence the objections come, the nature of these objections, and, to some extent, the motives which prompt them. The six very eminent members of the bar, interviewed by the *Gazette* reporter, have given in their adherence to the proposition to abolish terms and substitute sittings in the most unqualified terms. This is more important as it is the affirmation of a recommendation of the Bar, in November, 1876, *Wotherspoon's Manual*, 2nd Ed. pp. viii, ix. It may be said that since that time the bar has asked for monthly terms; but this was only subsequent to, and in consequence of, the destruction of Mr. Mousseau's bill in the Legislative Council last session. Their demand amounts to this, give us the means to be heard, we have been persistently refused the remedy we asked—there are degrees of badness, although the Code tries to say there are none of fault.

The "open secret" of the *Gazette* retains something of its original mystery. It is, however, no secret at all, that three Judges have avowed their approval of the four days' rule, and the Chief Justice has expressed no hostility to it publicly, so that the Justices Tessier and Cross alone oppose it avowedly.

It is, therefore, important to examine their reasons.

Mr. Justice Tessier's apparently amount to this—he doesn't like to leave his home, for the relative discomforts of an hotel, and he doesn't

like to have the Court sitting at Montreal for lengthened periods of time in his absence. Both these feelings are perfectly natural, but they are *personal*, and therefore, they can only be regarded as minor considerations. The learned Judge is, however, reported to have made two statements which require comment. He says: "The great difficulty has been in getting the cases heard. There has been no complaint about any delay in deciding them." With all due deference to the learned Judge, this is argumentative "padding." It is obvious that the fewer the cases heard, the less likelihood will there be for any ground of "complaint about any delay in deciding them." It is equally obvious that if the number of cases heard is considerably augmented and if the opportunity to decide them is almost totally taken away, the delay in giving judgments must necessarily become the part of the system in which the defect is apparent. The expedient attributed to the Irishman whose blanket was too short is not alone an outburst of Milesian genius. There is, however, another mode of concealing the precise spot where the arrangement breaks down—that is, by giving hasty and half-considered judgments; or, as Judge Baby happily put it, although unreported, "*si l'on nous impose une besogne trop forte les jugements s'en ressentiront.*" One word more on Judge Tessier's communication to the interviewer. The rendering judgments have considerably narrowed the days of term for hearing cases, and the attempts to have *délibérés* and to deliver judgments on days fixed for that purpose out of term, have signally failed.

It is almost touching to find that Mr. Justice Cross is embarrassed by a hankering after the old system (he calls it a system) which obtains in England and elsewhere; and he is not appeased by the belief that the Privy Council sits almost continuously until the work is exhausted. As a matter of history Mr. Justice Cross was not always so conservatively minded. In the last year of his practice (Nov., 1876), he attended a meeting of the Bar which voted the annihilation of the term system in the Court of Appeals *nem. con.*, and he took by no means a passive part in that meeting. Such change of view is perhaps not singular. Proverbially, circumstances alter cases, and men's

appreciation of them. Then he was a Montreal attorney clamouring that his client should be heard, now he is a Judge having to count, to some extent, with a Quebec prejudice. At all events, then he did not express the opinion that "the times of sitting had not much to do with the progress of business; it was merely shifting the days of work."

R.

THE ADVOCATE'S PRIVILEGE—WORDS SPOKEN ON TRIAL.

The English Court of Appeal in a recent case (*Munster v. Lamb*, 49 L.T. Rep. [N.S.] 253) had occasion to review the decisions touching counsel's privilege in the defence of a client. The defendant Lamb, a solicitor, was engaged to defend one Ellen Hill at the Brighton Petty Sessions. The prisoner Hill, a servant employed in the house, was charged with having administered soporific drugs to Munster's other servants, with the object of facilitating the commission of a burglary in his premises. It was proved that narcotics were found in the house, but the prisoner's counsel attempted to account for their presence by suggesting that Munster himself was using the drugs for improper purposes. "I have my own opinion," said Lamb, "for what purpose all these young women are resident in the house of Mr. Munster. I can believe that there may have been drugs in Mr. Munster's house, and I have my opinion for what purposes they were there, and for what they may have been used."

This was an insinuation of a very atrocious character, and without the slightest justification. Mr. Munster accordingly brought action for slander. Lamb pleaded that he was a solicitor, and that the words complained of were spoken while he was engaged as an advocate in the defence of Ellen Hill. The plaintiff was non-suited, and a rule *nisi* having been obtained calling upon the defendant to show cause why the non-suit should not be set aside, the rule was discharged by Justices Mathew and Smith. The plaintiff appealed, and Brett, M.R., and Fry, L.J., have affirmed the decision. It was admitted by the plaintiff's counsel that for some purposes advocates are privileged, but it was contended that the privilege exists only as long as the counsel is acting *bona fide*, and is

saying what is relevant to the proceedings in which he is engaged. The Lords Justices of Appeal, however, overruled this pretention, and laid down the wide rule that no action lies against counsel for words spoken with reference to and in the course of a judicial inquiry in which he is engaged as counsel or advocate, even if such words are spoken maliciously and without reasonable and probable cause, and are irrelevant to any issue or question forming the subject of inquiry. Brett, M.R., said: "A counsel is in a position of extreme difficulty, for he has not to speak of the things which he knows; he does not know whether the facts which he is instructed to bring forward are true or false, but he has to argue in favor of the proposition which will best advance the case of his client. He wants protection more than the judge or the witness, and he wants it more for the public benefit. In my opinion the reason of the rule covers him, not merely as much as the other classes of persons, but more, in order that he may be able to keep his mind free for the performance of his duty. The protection is given not for the benefit of a man who may wish to act with malice; but the reason is that if the rule were otherwise, an innocent counsel would be in danger, and would be put to trouble. It is better that the rule should be made large, even though it may be large enough to cover the case of a man who acts with malice and is guilty of misconduct."

LAST WORDS.

The case of *Brousseau v. Seybold*, which appeared in our last issue (p. 389), may be regarded as an appropriate sequel to the discussion which occurred some time ago with reference to the decision of the Supreme Court in the case of *Shaw & Mackenzie*. That was a judgment which took a great many persons by surprise, and which certainly effected a serious revolution in practice. It became at once a very delicate and a very responsible duty to advise the issue of a *capias* in any case of meditated flight from the jurisdiction, however aggravated might have been the conduct of the debtor and however hopeless the creditor's prospect of ever receiving one farthing of his just claim if he suffered the fugitive to escape. It naturally followed, therefore, that

the remedy by *capias* gradually passed into disuse; that class of persons who think that the world owes them a living without any work on their part snapped their fingers at those who had been foolish enough to trust them, and went to and fro as they pleased, and where a creditor was audacious enough to venture upon the perilous remedy of *capias*, he almost invariably found himself brought up short by the quashing of his proceedings, which, in turn, was followed by an action of damages.

A case of this kind was *Brousseau v. Seybold*, which came before Mr. Justice Johnson, who also pronounced the original decision in *Shaw & Mackenzie*. The learned Judge reviews the latter decision and naturally is tempted into some criticism which the bar will doubtless appreciate. The shaft of sarcasm is delicately tipped but the point is keen, and the effect is enhanced by the fact that the learned judge is almost without a rival in the appreciation of testimony—a task in which he has had more than ordinary experience.

Something may undoubtedly be said in behalf of the policy of the new departure. Those who have not paid their debts in the past are not likely to pay them in the future. If they stay here they will continue to prey upon their friends and the community at large. Perhaps it is not wise to oppose any obstacle to their flight to pastures new, in the glorious company of "migratory Arctic birds," as our respected confrère of the *American Law Review* calls them.

NOTES OF CASES.

COUR SUPÉRIEURE.

MONTREAL, 12 novembre 1883.

Coram LORANGER, J.

FÉLIX MOLINARI, requérant *certiorari*, v. M. C. DESNOYERS, intimé, & W. B. LAMBE, poursuivant.

L'Acte des Licences—Magistrat de Police—Jurisdiction.

10. *Le magistrat de police a juridiction pour révoquer le certificat d'un licencié qui souffre une condamnation pour contravention à l'acte des licences de 1878.*

20. *Le magistrat peut prononcer sur l'accusation sans distinguer entre les différentes offenses indiquées dans la plainte quand elles sont toutes de même nature.*

30. *L'acte des licences est dans les attributions conférées aux provinces par la section 92 de l'acte de l'Amérique Britannique du Nord.*

PER CURIAM. On demande par le présent *certiorari* la cassation d'une conviction prononcée contre le requérant par le magistrat de police, le 28 juin 1883, sous l'acte des licences de 1878. Le requérant était accusé d'avoir souffert que de la liqueur enivrante, vendue dans son magasin où il a sa licence, fût bue dans son magasin, le neuvième et le seizième jour de juin 1883, par une personne ne résidant pas avec lui et n'étant pas à son emploi. Le magistrat a maintenu la plainte et a condamné le requérant à payer l'amende imposée par la section 74 du dit acte qui s'applique au cas; il a en outre révoqué le certificat en vertu duquel le requérant avait obtenu sa licence pour vendre des liqueurs enivrantes dans son magasin. Cette révocation est permise par la section 102 du même acte.

Le requérant se plaint de cette conviction et demande qu'elle soit infirmée pour entr'autres raisons les suivantes: 10. parceque le magistrat de police n'avait pas juridiction pour révoquer le certificat de licence; 20. parceque, par la conviction, il appert que le requérant a été poursuivi pour deux offenses, l'une commise le neuf et l'autre le seize juin, et que la conviction ne fait pas voir pour laquelle des deux offenses la condamnation a été imposée; 30. parceque le poursuivant n'avait pas demandé par sa plainte la révocation de la licence et conséquemment que le magistrat aurait jugé au-delà des conclusions de la demande.

En dernier lieu, le requérant s'attaque à l'acte des licences lui-même, qu'il dit être inconstitutionnel.

Sur le premier point, savoir: que le magistrat était sans juridiction à révoquer le certificat de licence, il n'y a qu'à consulter le Statut, pour voir que cette prétention n'est pas fondée.

Les termes de la section 102 sont clairs et précis et ne sauraient donner lieu au doute; voici comment ils se lisent: "Si un licencié " pour la vente des liqueurs enivrantes, ou pour " tenir un hôtel de tempérance, souffre une con- " damnation pour contravention à la présente

"loi, ou est convaincu de félonie, le tribunal prononçant la sentence ou les commissaires des licences dans la cité de Montréal peuvent révoquer le certificat en vertu duquel il a obtenu sa licence."

Le Bureau des Commissaires a été aboli par le chap. 3 de l'Acte 42-43 Vict., et le magistrat saisi des plaintes portées sous l'Acte des licences est revêtu des pouvoirs et attributions que possédaient ces commissaires.

Le requérant prétend que le magistrat n'a pas compétence pour révoquer ce certificat qui, suivant lui, doit être révoqué par un tribunal supérieur. Il m'est difficile, malgré l'ingéniosité que l'on a déployée à l'argument, de saisir la raison et la convenance de cette procédure. La loi déclare positivement que le tribunal saisi de la plainte pourra révoquer la licence. Or, quel est ce tribunal ? Si on réfère aux sections 194 et suivantes de l'Acte de 1878, on trouvera que les plaintes et poursuites de cette nature se portent soit devant la Cour Supérieure ou de Circuit, soit devant deux juges de paix, ou devant le juge des sessions de la paix, ou devant la Cour du Recorder, ou le magistrat de police, ou le magistrat de district. Or, dans l'espèce, elle a été portée devant le magistrat de police, qui avait juridiction à recevoir et juger la plainte. Le rouage imaginé par le requérant ne pourrait avoir d'autre effet que d'embarrasser la procédure et de rendre tout à fait illusoire la disposition si sage de la loi, qui punit les infractions aux règles de discipline qu'elle a établies, par la perte du privilège qu'elle a accordé au porteur de la licence.

On se plaint, en deuxième lieu, qu'il y aurait eu cumul d'offense dans l'accusation, et que le magistrat n'a point indiqué celle qu'il entendait punir. Ce sont les sections 205, 206 et 261 de l'acte de 1878, tel qu'amendé par la 42-43 Victoria, qu'il faut consulter sur ce point.

"On peut, dit la section 205, cumuler dans une déclaration, information, plainte ou sommation, plusieurs contraventions commises par la même personne pourvu que cette déclaration, plainte, information ou sommation contienne une énonciation spécifique du temps et du lieu de chaque contravention, et, en ce cas, les formules indiquées par cette loi seront modifiées *mutatis mutandis*." La section 206 ajoute: "Mais si la poursuite est portée devant un autre tribunal que la Cour de Circuit

"ou la Cour Supérieure, le montant de l'amende sur une seule et même plainte ne doit jamais excéder \$100, quelque soit le nombre des contraventions."

La section 205 est amendée par la 42-43 Vict., chap. 29, de la manière suivante: "Mais il ne sera pas donné plus d'honoraires au procureur que s'il n'y avait qu'une seule contravention."

Il me paraît clair, d'après les termes de ces trois sections interprétées ensemble, que le magistrat peut prononcer sur l'accusation sans distinguer entre les différentes offenses indiquées dans la plainte, quand elles sont toutes de même nature. La formule 1 qui, aux termes de la section 261, forme partie de la loi, démontre que la mention d'une date précise n'est pas absolument requise.

Vient maintenant la question de constitutionnalité de la loi. Le requérant a prétendu que l'acte des licences était inconstitutionnel et avait été jugé tel par le Conseil Privé dans la cause de la *Reine v. Russell*. Le requérant fait erreur; tel n'a pas été le jugement dans la cause *Russell*, et le Conseil Privé a particulièrement évité le point, sur lequel du reste il n'était pas appelé à se prononcer. Tout ce qui a été jugé dans cette cause, c'est que l'acte de tempérance du Canada de 1878 n'intervenait pas avec les sous-sections 9, 13 et 16 de la section 92 de l'acte de l'Amérique Britannique du Nord; que cet acte s'appliquant plutôt aux offenses publiques qu'aux droits civils, était d'un intérêt général pour la Puissance; que s'il affectait les revenus provinciaux, ce ne pouvait être que d'une manière incidente.

L'acte des licences est dans les attributions conférées aux provinces par la section 92 ci-dessus citée de l'acte de 1867. Il serait oiseux de faire une longue discussion d'une question déjà traitée par les cours de différentes juridictions dans cette province et définitivement jugée en appel. Je me contenterai de référer les parties à la cause même de *Russell v. The Queen*, 5 Legal News, p. 234; à la cause *Suite & La Corporation des Trois-Rivières*, p. 332 du même volume, et aux nombreuses citations que l'on trouvera dans ce dernier rapport.

Au reste, y eût-il doute sur le point, que ce doute se trouve levé par la section 30 de la 46e Victoria, qui déclare que jusqu'au mois de mai 1884, toutes les lois de licences passées par les

législatures provinciales du Canada seront et sont déclarées valides et effectives à toutes fins que de droit, tout comme si elles eussent été décrétées par le parlement du Canada.

Sur le tout, je suis d'opinion qu'il n'y a pas erreur dans la conviction dont est appel, et je déboute le certiorari avec dépens.

Augé & Cie. pour le requérant.

N. H. Bourgois pour le poursuivant.

SUPERIOR COURT.

MONTREAL, November 30, 1883.

Before JOHNSON, J.

SCOTT v. TURNBULL.

Promissory Note—Evidence.

Parol evidence is admissible to establish the actual order of endorsements of a note or bill, the instrument being only prima facie evidence.

JOHNSON, J. This is an action by the indorsee and holder of a promissory note against the defendant as having endorsed it as a guarantor (*pour aval*), and the facts alleged in the declaration are, that the Standard Drain Pipe Company being indebted to one Mitchell, promised to settle with him by giving an approved endorsed note, and gave him their note in consequence, (the one now sued upon) payable to his order, and further procured the name of the defendant to be put upon it as guarantor; that the note so endorsed by Turnbull was delivered by the Company to Mitchell who endorsed it for value to the plaintiff. The defendant met the action by two pleas: 1st, alleging that the plaintiff had merely lent his name to Mitchell the true holder, and had no right of action; 2nd, that the plaintiff got the note after maturity: that the defendant knows nothing of any agreement between Mitchell and the Company, and that he endorsed the note for Mitchell's accommodation, and never signed as guarantor. That Mitchell is a prior endorser to the defendant, and is therefore liable to him, and the note is subject to all the equities between Mitchell and him. The answers are general. When the case came on for trial, Mitchell was called by the plaintiff, and proved every word of the declaration,—and also that the note had been endorsed by him before maturity; but delivered to Scott in payment of an old debt after maturity. Mitchell's evidence was objected to on the ground that it was parole evidence to vary the contents of

a written instrument; and I might have had difficulty in saying that the plaintiff ought to get judgment on Mitchell's evidence alone; but it is sworn by another witness (Mr. McCall) that the note was brought to him on the day of its maturity, *or the day before*; and that the only name on the back of it at that time was Turnbull's, and that the only reason Mitchell wrote his name on it even then, was because the witness asked him to do so, as it was payable to his (Mitchell's) order. So that it is quite clear Mitchell is not a prior endorser to Turnbull; but the latter must have signed as security. Therefore there are no equities as between Mitchell and Turnbull which Turnbull can oppose to Scott. If Mitchell had brought suit in his own name both against the makers and Turnbull, what could Turnbull have had to say to him? Evidently nothing; and he can't have anything more now to say to Scott who got the note subject to the defences existing against it. As to the objection to parole evidence to vary the apparent contents of the note, I would refer the parties to 1st Daniel on negotiable instruments, p. 520-21, No. 704: "Where a note is endorsed by the payee and by a third party, the legal inference is that the payee is prior indorser; but it may be proved otherwise by parole evidence." That was the opinion I expressed at the hearing, and nothing has been said or cited to alter it since. I have not, of course, had time to examine the question very attentively; but I see in Bigelow's law of bills and notes, 2nd Ed., p. 174, a number of cases cited in support of this view, and the commentator uses almost the same words that I did. He says: "The actual order of indorsement, where there are several indorsements, is open to parol proof; the note or bill being but *prima facie* evidence; and he cites *Coolidge v. Wiggins*, 62 Maine, 568; *Sturtevant v. Randall*, 53 Maine, 149; *Smith v. Morrill*, 54 Maine, 48; *Clapp v. Rice*, 13 Gray, 403; and goes on to say, in this manner, one who appears to be an indorser, and in law is such *prima facie*, may be shown to be a joint promisor or guarantor, and in support of that he cites *Browning v. Merritt*, 61 Indiana, 425; and *Way v. Butterworth*, 108 Mass. 509.

The judgment therefore is for the plaintiff.

Robertson, Ritchie & Fleet for the plaintiff.

Kerr & Carter for the defendant.

SUPERIOR COURT.

Before JOHNSON, J.

THE ONTARIO BANK V. FOSTER.

Insolvency—Benefit of Term—When action on note may be instituted.

1. A firm which has ceased to meet its ordinary payments as they become due, will be deemed insolvent within the meaning of 1092 C.C., and the insolvency of the firm entails that of the partners individually.
2. An action on a promissory note against the maker, instituted on the afternoon of the third day of grace, is not premature.

PER CURIAM. The action is to recover the amount of a promissory note, signed by the defendant and endorsed by his firm, A. M. Foster & Co., for \$15,000, dated 21st day of November, 1882, and payable three months after date at the Ontario Bank in Montreal. The suit was accompanied by an attachment before judgment which has been dismissed upon the ground that fraudulent secretion was not established. A consent has been filed in the record, that the evidence and exhibits which were filed upon the issues raised upon the petition to quash the attachment shall avail upon the present issue.

There are really only two points for consideration:—

1st. Whether the action was prematurely brought.

2nd. The amount (if any) for which judgment is to be rendered.

The last day of grace expired on the 24th of February last, and the action was instituted on the afternoon of that day, after banking hours. The declaration alleged that at the date of the action, and for some time past, the defendant had been insolvent, *en état de déconfiture*.

The right of action therefore depended on two points:—1st, the insolvency as depriving the debtor of the term; 2nd, the existence *de plano* of the right to sue on the afternoon of the third day of grace.

The plaintiffs contend that the defendant had become bankrupt before the 24th February, and that the amount of the note was exigible before and on that date. They also contend that under the circumstances proved in the case, even if the defendant had not been bankrupt, the action was not prematurely instituted.

On the question of bankruptcy the plaintiffs cite 1092 C. C. The English version reads as follows:—

"The debtor cannot claim the benefit of 'the term when he has become bankrupt or insolvent, or has by his own act diminished the security given to the creditor by the contract.'"

The French version reads as follows:—

"Le débiteur ne peut plus réclamer le bénéfice du terme, lorsqu'il est devenu insolvable ou en faillite, ou lorsque par son fait il a diminué les sûretés qu'il avait données par le contrat à son créancier."

Article 17 C. C., sub-section 23, reads as follows:—

"By 'bankruptcy' is meant the condition of 'a trader who has discontinued his payments.'"

The French version is as follows:—

"La faillite est l'état d'un commerçant qui a cessé ses paiements."

It cannot be disputed that the defendant, before and on the 24th February last, was a bankrupt, "insolvable," within the meaning of these articles.

It is proved by the evidence of Mr. Taylor, partner in the firm of A. M. Foster & Co., the endorsers of the note, and of which firm defendant was a member, that on the 18th of January, 1883, a letter was written at Mr. Foster's dictation, to all the English creditors of the firm, notifying them that they would not be able to meet the drafts falling due on the 4th of March following. This letter was to all intents and purposes a suspension of the firm of A. M. Foster & Co., and it did not after the said date meet any of its engagements as they became due. It is indeed admitted on all hands that the firm then suspended payment.

Mr. Stephenson proves that on the 14th February last there were 32 notes lying at the Ontario Bank overdue bearing the firm's name; in addition to this there was about \$20,000 overdue to English creditors, and \$2,000 to Canadian creditors.

The learned Judge who rendered judgment dismissing the attachment before judgment, by one of the *considéran*ts of his judgment, held as follows:—

"Considérant qu'il n'est pas prouvé que le défendeur, quoiqu'insolvable au commencement des procédures adoptées par la dite demande, soit en état de déconfiture."

The learned Judge makes a distinction between being "insolvable" and being "*en état de déconfiture*."

Under the articles of the code above cited it is not necessary that defendant should have been "*en état de déconfiture*," to render the note exigible; it was sufficient that he was "*insolvable*." The very word used by the learned judge, is the word used in article 1092, "*insolvable*," and so it has been held in the case of *Corcoran v. The Montreal Abattoir Co.*, reported in the 6th vol. of the Legal News, p. 135. The holding in that case was that a company *ceasing to meet its ordinary payments* when they became due, though its nominal assets may be equal to its liabilities, will be deemed *insolvent*, and cannot claim the benefit of the term upon a note not yet due.

It has always been held that the bankruptcy of the firm entailed that of the individual partners. The partners of A. M. Foster & Co. were jointly and severally liable for the negotiable paper bearing the firm's name, which matured from the date of the suspension (18th January, 1883,) to the 24th February, when suit was instituted (Art. 1854, C.C.). Stephenson (one of the trustees) proves that there was about \$30,000 of negotiable paper, upon which the firm was liable, overdue and unpaid on that date. In fact, the firm became dissolved by the suspension (bankruptcy) (Art. 1092, C.C.), and defendant was bound to have paid the maturing paper, as if he alone had signed it. The Court, therefore, is with the plaintiff on the first point, and adopting the view of the learned judge who dissolved the attachment, holds that the defendant was insolvent; and under Art. 1092 C.C. the note had become exigible. As to the second point—the right of action on the third day of grace after banking hours—I am with the plaintiff also. The general rule, no doubt, is that the law does not recognize fractions of days; and upon that principle, in a case of *Ste. Marie & Stone** the Court of Appeals held that prescription of a note only commenced after the third day of grace. But here we have to see what effect the law gives to a term of indulgence such as 'grace,' or the days of grace. Prescription certainly runs by entire days; but does that principle of positive law

quite satisfactorily dispose of the question as to the point of time when a right of action arises in such a case as this. I think not. Daniel in his work on Negotiable Instruments, vol. 2, p. 214, secs. 1207, 1208 and 1209, discusses the question and winds up by saying: "But there is still stronger reason to hold that the action may be commenced after demand and refusal on the last day of grace, for grace was originally a matter of indulgence and courtesy, and not of contract, and it would seem unreasonable to extend indulgence after the maker has expressly refused to make the payment on the last day allowed him. The weight of authority supports the view that suit may be commenced on the last day of grace against the maker." There are, he says, contrary authorities.

When we come to look at our own code, and the statute law which it reproduces, the point seems still more clear. Art. 2319 of our Civil Code says: "Bills of exchange after presentment for payment, as provided in the 5th section of this chapter, if *not then paid*, are protested for non-payment *in the afternoon of the last day of grace*. The protest is held to have been made in the afternoon of the day on which it bears date, unless the contrary appears on the face of it." Turning to the 5th section, we find the same provision as to the *afternoon* of the third day of grace, a particular provision of law applicable to bills and notes, and giving rise to rights, not only on particular days, but *in the afternoon* of a certain day. Then, looking at our consolidated statutes, c. 64, sec. 16, from which Art. 2319 is taken, we find the same thing; but, as I venture to think, more plainly expressed than in the Code. We find the words of the 16th section to be: "If any bill or note is unpaid *at the expiration of the forenoon* of the last day of grace, the holder thereof may cause the same to be duly presented for payment, and in default thereof to be protested for non-payment, and if such bill or note is payable at a bank (which was the case here) it may be presented at such bank, and the demand of payment preliminary to the protest thereof may be made either within or after the usual banking hours of such bank." I confess I am at a loss to see what more can be wanted than a presentment for payment at the time allowed by law, and

* 5 Legal News, 322.

the refusal to pay. If the right of action does not arise from that moment, when does it arise? I must confess that if there is no such right of action I cannot see either the use of a demand or the meaning of a refusal. If a man, at a lawful time, when his debt is due (and there can be no doubt as to the time it was due, under the words of the articles and the statute cited) is asked to pay, and he says no, what possible use can there be in waiting another day or another hour before taking steps to make him pay? Besides, in the present case there are other circumstances showing not only that the defendant had not the funds ready at the place of payment, but that he had made up his mind not to pay this note (see the evidence of Mr. Taylor and Mr. Chipman). Of course I am not bound to go into this part of the case at all, holding, as I have done, that the insolvency made the debt due. If I had any doubt of the right of action existing after the protest, and in the absence of funds at the place of payment, I should still hold that the defendant's known and proved intention not to pay the note was a very strong circumstance to give a right of action after the expiration of banking hours. However, I have given my views more from courtesy than necessity, as the first ground of the judgment is sufficient.

As to the precise amount due, I have examined the statements and pretensions of both parties, and I adopt the statement of the plaintiff which, after deduction of sums to be credited, would leave the exact amount due to the plaintiffs \$8,040.83, with interest on the total amount of the note up to the time of paying the 50 cents on the dollar, which are credited, and after that, on the balance, with costs.

Abbott, Tait & Abbotts for the plaintiff.

Geoffrion, Rinfret & Dorion for the defendant.

RECENT ENGLISH DECISIONS.

Larceny—Of Water in Pipes.—Water supplied by a water company to a consumer, and standing in his pipes, may be the subject of a larceny at common law. Q. B. D. April 24, 1883, *Firms v. O'Brien*, L. R., 11 Q. B. D. 21.

Bigamy—What constitutes.—The prisoner was convicted of bigamy. It was proved that he had married W. in 1865, and had lived with

her after the marriage, but for how long was not known; that in 1882, W. being still alive, he had gone through the form of marriage with another woman, but there was no evidence as to the prisoner and W. having ever separated, or as to when, if separated, they last saw each other. Held by the court (Lord Coleridge, C.J., Pollock, B., Manisty, Lopes, and Stephen, JJ.), that the prisoner was rightly convicted. C. C. R., June 2, 1883. *Queen v. Jones*. (Opinion by Lord Coleridge, C.J.) L. R., 11 Q. B. D. 118.

THE ADMINISTRATION OF JUSTICE.

The following letter, which appeared in the *Montreal Gazette*, deals with a kind of misrepresentation of judicial proceedings which abounds in the daily press:—

SIR,—The *Daily Witness* about three days ago contained an article resembling others that have appeared in it, in which it abuses the Administration of Justice in Quebec Province, and complains of the slowness of the Judges, the intricacies of the practice, &c. I can speak from experience, and I say that in no country is justice in the Civil Courts administered with greater celerity than in Quebec Province. In no country is there a Court of Appeal that can equal our Court of Review for simplicity of procedure, small costs and speediness of judgments after arguments. As a general rule the appeals heard in the last week of one month are disposed of at the end of the next. In Ontario an appeal, say from a Vice-Chancellor, heard before three judges in January, may remain undecided until the middle of November or December, and this in a case not embarrassed by parol evidence whatever. I am one victim of this administration so applauded by the *Witness*. I may add that the cost of procuring the judgment of the Vice-Chancellor in that case amounted to eight hundred dollars in all; though no witnesses were examined, adding to the costs. There were one plaintiff, represented by his lawyer, and several defendants, represented by two lawyers. Such a case as that would have been as fully debated and as solemnly judged, in our Superior Court, for less than three hundred dollars *in toto*; and the judgment in appeal would have been rendered in February; whereas in the case I speak of, argued in January last, no judgment has yet been rendered.

Yours,

M.

17 November, 1883.

The Legal News.

VOL. VI. DECEMBER 22, 1883. No. 51.

THE SITTINGS OF THE COURT OF QUEEN'S BENCH—DISPLACING THE QUESTION.

There are all kinds of argument—good, bad, and indifferent—which may fairly be used; but there is another kind of representation, often used in discussion, which is not so defensible. It consists in the adroit substitution of a suggestion, which has no pretension to be an argument in place of one, so as to divert the attention from the matter in hand to some cognate subject.

Thus we have been reminded that there are two thousand cases in arrear in the Supreme Court of the United States, and that several English Courts have from five to eight hundred cases in arrear. It is impossible to imagine how these facts, if they be true, can alleviate the condition of a litigant before the Court of Appeals of this Province.

"And common is the commonplace,
And vacant chaff well-meant for grain."

There are delays inseparable from the administration of justice, but delay caused permanently by the encumbrance of the Roll for hearing cases is not necessary, and is a reproach to those who administer the law, or to the legislature which fails to provide sufficient machinery, or to both.

On the other hand, we are assured that the lawyers are too long-winded, and that the *panacea* for all evils of this sort is to be found in imitating the system adopted in Louisiana. It appears, that there, they manage to dispose of 100 cases in a few days. This is very satisfactory in a sense, and with similar expedition here, we should not only get rid of our arrears in a twinkling, but we should have the satisfaction of seeing the six Judges of Appeal enjoying an enviable amount of leisure. But before growing enthusiastic about this captivating result, let us see by what means it is obtained. The Court there is composed of five judges, who sit together to hear cases, the

lawyers are allowed an hour each to speak in any case, whether they have much or little to say, and no one is permitted to speak longer than an hour without leave of the Court. Then the case, being heard, is taken *en délibéré*, that is to say, one of the five judges examines it, and makes a report of his examination to the others. If they agree to this report, then judgment is rendered for the party in favor of whom the examining judge reports; if not, there may be some discussion, which must evidently be between those who are slightly informed of the merits and one who knows them thoroughly, till they come to the opinion of a majority. If the unsuccessful party is not satisfied, he asks for a re-hearing, which, it seems, he rarely gets; but if he does, the case is again referred to one judge, and so on the matter goes again till the Court refuses to be further occupied with the question. The excellence, from an executive point of view, evidently consists in choking off re-hearings.

I am not prepared to say that justice is not well administered in Louisiana, but before accepting these exotic novelties, which seem to delight the imagination of those who dread the slightest home-spun innovation, a great change will have to be operated in the minds not only of the bar but of the public. If the public choose to be satisfied with judgments pronounced on the appreciation of one judge, or on the impulse of the minute by five, the arrears may easily be disposed of, even without the help of extra terms.

In the Quebec *Chronicle* of the 4th December, there is an instance of a still more objectionable mode of displacing the question. Some one signing "A Barrister," writes:—"If the idea expressed by one of the judges, that the Court should sit permanently in Montreal, was carried out, Quebec's *role* would be reduced to that of a rural district, and the litigants of our city would be forced to carry their records and cases to Montreal lawyers, who would not refuse them."

There are fictions founded upon fact, but this is one of a different sort.

For the honour of the profession it is to be hoped that the pseudonym of the *Chronicle's* correspondent is not more true than his statement.

R.

THE ONTARIO AND QUEBEC APPEAL COURTS—PROGRESS OF BUSINESS.

We have already mentioned that the Ontario Court of Appeals is encumbered by a list of inscriptions even longer than that of our Quebec Court, although it is not embarrassed by having to sit in two cities, 180 miles apart. Nevertheless it seems their lordships of Ontario do not think that business will be facilitated by sitting continually, regardless of what is to follow the arguments. Accordingly, we read in the Toronto journals of the 13th, that on the 12th—"At the opening of the Court of Appeal "at Osgoode hall, Chief Justice Spragge "remarked that he understood both bench and "bar were of opinion that it would facilitate "the speedy administration of justice if the "court should adjourn until decisions had been "given in the cases already argued, and now "standing for judgment before them. Mr. C. "Robinson, Q.C., stated that he had spoken to "several members of the profession on the "subject, and *all* were of opinion that the "suggestion of his Lordship should be acted "upon. The Court, therefore, will not sit again "until the eighth of January, except for the "hearing of election cases." When our Quebec Court met in Montreal on the 12th instant, there were 18 *délibérés* from the last Montreal term and 12 from the Quebec December term. Up to Saturday, 15th, there were twelve more cases taken *en délibéré*, making 42. On Monday five judgments were rendered, reducing the list of *délibérés* to 37. From Monday to Thursday afternoon, date of present writing, 13 cases were heard, bringing the list of *délibérés* up to 50.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

QUEBEC, December 7, 1883.

DORION, C.J., MONK, RAMSAY, TESSIER & BABY, JJ.

REGINA v. DELÉRY et al.

Mining Rights—Rights of the Sovereign—Letters Patent.

1. *By the old law of France, which is in force in Canada, the right to minerals did not pass by a grant of lands to the grantee, without special words, but remained in the Sovereign.*
2. *The King of England, at the Cession, succeeded to this right.*

3. *The Sovereign could grant the right to minerals to whomsoever he pleased, and in such case the owners of the soil had no right except to an indemnity for any damages they might suffer by the mining operations.*

The judgment appealed from was rendered by the Superior Court, Quebec (Caron, J.) See 9 Q. L. R. 225.

RAMSAY, J. This is an information by the Attorney-General of the Province of Quebec, in the nature of a *scire facias*, questioning the validity of Letters Patent of the late Province of Canada granting to Dame Marie Josephte Fraser, Charles Joseph Chaussegros de Léry, Alexandre René Chaussegros de Léry, their heirs and assigns for ever, the right to mine for "gold and other precious metals" within the limits of the fief and seigniorship of Rigaud-Vandreuil, the property of the grantees.

The conditions on which this grant was made were :

1st. That the grantors "shall well and truly pay to other our loving subjects such damages and compensation as may from time to time accrue in consequence of the ground occupied by the opening of roads and other like causes resulting from the operations in working the said mines ; 2nd, that the grantees before working the mines should transmit and deposit with our secretary of the Province of Canada "a true and correct statement of the nature, situation, and extent of said ores, minerals, and mines" ; 3rd, that the said grantees should transmit in each and every year to the Receiver-General of the Province a true and correct account of the gross produce of the same, in such form and manner as may thereafter be directed ; 4th, that the grantees should "well and truly pay and deliver in each and every year, from the time of melting the said ores for the first time in working furnaces, to the Receiver-General, one net tenth part of the whole gross produce of the said ores, minerals, and substances, &c., "the said one tenth part being melted, cast and prepared in the same manner as the like may be for the behoof" of the said grantees ; and refined according to the laws of France as confirmed by the Edict of the month of June, 1601.

And the patentees were further granted a remission of the payment of the tenth for five years from the date of the patent—that is from 18th Sept., 1846.

The narrative part of the Patent sets forth that it was granted on the representation of the said grantees that they were "seigniors and proprietors of the fief and seignior of Rigaud-Vaudreuil," &c., "that there are supposed to exist within the limits of the said fief and seignior certain ores, minerals and mines, containing gold and other precious metals of which supposed mines they have made the discovery, and are now desirous of digging and working for their own profit and advantage."

The respondents are the representatives of the said grantees, and it is sought to set aside the said Patent—

1st, Because it "was obtained by deceit, surprise, fraud, misinformation, and misrepresentation, practised by the grantees on the Government of Canada."

2nd, Because in the original grant to Mr. de la Gorgandière, and by the royal confirmation of that grant, there is no special grant of the mines to the seignior, and no reservation of them by the king, in fact no mention of them at all, except in so far as the Seignior is enjoined, "*De donner avis à Sa Majesté ou à nous et à nos successeurs des mines, minéraux, minérales, si aucuns se trouvent en la dite étendue*" of land so conceded as a fief.

3rd, That the Seigniorial Court had decided that "all reservations of mines by the Seignior were and are illegal, null and void, in all cases when the original grant contains no such reservations."

4th, That by the Seigniorial Act and the making of the *cadastre* all the rights of the Seignior, as such, were liquidated.

5th, That the *cessitaires* of the Seignior, and particularly one Archibald McDonald, have represented that no action had been taken by the de Léry Mining Company, to test the validity of the De Léry Patent, and that the Company had not settled amicably with the *cessitaires*.

6th, That portions of the Seignior had been conceded by the Seignior long before the grant of the Patent, and some portions since.

7th, The non-fulfilment by the grantees of the conditions of the grant.

8th, Irregularities in the Patents.

9th, That the grant to M. de la Gorgandière was not a grant of the Seignior in question.

These seem to cover in general words the grounds on which the Attorney-General relies

in order to obtain his conclusions; namely, that it be declared that the Letters Patent of the 18th Sept., 1846, were illegally and improvidently issued, that they are null and void, and that they be annulled and set aside, and that the enrollment and enregistration thereof be cancelled."

The deceit, fraud, surprise and misinformation is said to consist (a) in the fact that the grantees were not the owners of the soil in their seignior, the Seignior not having any proprietary rights in his seignior, part being conceded and part being held by the Seignior subject to obligatory concessions; (b) that the grantees were not discoverers, but that gold had been found there before by several persons.

It is also said there was a mis-recital in the deed, and, we may presume, it is intended we should understand, although not particularly alleged, that the *auteur* of the grantees of the Patent was never owner of the fief in question, and, finally, it is insisted that the owners of the soil (presumably the *cessitaires* are intended) were entitled to a grant of these mines, and that the Crown could not grant a Patent to work mines till after the owner of the soil had refused to work them.

If the Attorney-General fails in his suit, it will not be for want of the allegation of grievances. Part of those complained of are met by a simple denial of the fact alleged, supported by the averments of the Patent and of the information itself. Whatever may be the legal value of the argument that a Seignior had no proprietary rights in the fief conceded to him and that he had no rights in the soil, it appears the grantees only represented that they were seigniors and proprietors of the fief and seignior of Rigaud-Vaudreuil, and this fact is not denied. So they only averred that they owned what that title gave them. They say to the Crown, we hold from the Crown, what the King of France gave us by a title that is perfectly known, and it is idle to pretend that the Crown could have been deceived in the matter.

As to the grantees not being discoverers, it seems that the information confounds the grounds for setting aside Patents of Invention, with those for setting aside Patents to discoverers. Obviously the inventor is an originator, while the discoverer is not. History and

international law establish this. The discoverer who is rewarded by a Patent, is he who, without fraud, brings the knowledge to the sovereign of a fact hitherto not generally known. Again, finding pieces of gold in rivers or strewed about by accident was never assimilated to finding mines, nor subjected to the same policy. The "*or en paillote*" was declared to come "*par forme de manne et grâce de Dieu*," and it was the property of the finder who gathered it, whatever might be his condition. Lamé-Fleury, 116.

If it be true that the owners of the soil are absolutely entitled to all the mines on their property, then the information must fail in so far as regards all portions of Rigaud-Vaudreuil unconceded on the 18th September 1846.

It will, however, be perceived at once that the position taken up by the Attorney-General is somewhat ambiguous. It is one thing to say that the owner of the soil, is owner of the minerals on his land, and quite another to contend that he has an equitable claim to a grant.

As these questions are really those of greatest importance in this suit, and as they are mixed up with other propositions, we shall deal with them later. The only object in mentioning them at this part of the case is, that it may not be supposed they were over-looked in arriving at the conclusion that the Patent in question cannot be set aside owing to fraud or misrepresentative on the part of the grantees or any surprise of the government.

The grounds for setting aside the Patent, which are grouped above as 2ndly, 3rdly, 4thly, 5thly and 6thly, set up two pretensions totally different, and to some extent incompatible.

One seems to be that the King of France having made no reservation of the mines of precious metals, they passed to the seignior, as some sort of inexplicable trustee for nobody in particular, that any reservation of such mines in a concession by the seignior was null and void, and that if, in any case, it could be considered good, the seignior had been compensated by the commutation of the tenure.

The other proposition is that the King of France did not part with them to the seignior or to anybody else, and that lawfully the King could not grant them to anybody but the actual owner of the soil, unless the owner refused to work them.

In connection with these propositions we

have been referred to the Judgment of the Seigniorial Court, and we have been told, that all its decisions are *choses jugées* as regards the whole world.

There were a good many rather original ideas current at the time of the seigniorial agitation, but I do not remember ever having heard this one. Accidentally I knew a good deal about the earliest suggestion of the Seigniorial Court, and I should have been a good deal surprised if the idea of *choses jugées* had found its way into the statute. The idea of the proposer of the Seigniorial Court was, that these answers should be judicial declarations of the law in the abstract, something akin to *rescripts*, or perhaps more like *responsa prudentum*, for the guidance of the Commissioners to be appointed under the Act, and of the Attorney-General. That this view is the correct one will appear by reference to the 9th section of the Act of 1854, and to Sir Louis Lafontaine's remarks on the functions of the Seigniorial Court.

"Ce tribunal exceptionnel que la Législature a ainsi jugé à propos de créer, composé de tous les juges des deux premières cours du Bas-Canada, est appelé, sans exposé d'aucune espèce particulière à laquelle les lois existantes puissent être appliquées, à prononcer d'une manière abstraite, des décisions, ou plutôt des *rescripts* pour ainsi dire, qui doivent virtuellement déterminer le sort des prétentions respectives des seigneurs et des censitaires." (Questions Seigneuriales, Vol. A, 4 b).

The authority of this Court is doubtless very great whether we consider it historically, as a special institution created for the express purpose of overcoming difficulties of a formidable kind, or its composition and the means taken to turn that composition to profit. In a word it seems to me to have been a body legislating under the influence of judicial science—a legislature rather than a Court. Important then as its utterances are, it is not astonishing to find that they do not decide this case, although they do incidentally dispose of some of appellant's pretensions. Under the guidance of these decisions, the Commissioners could not give the appellants, or their *auteur* M. de Léry, any indemnity for mines and minerals. The decision on this point is short and perfectly explicit. (Vol. A 82 a), § 3. "*Les réserves suivantes, ou autres analogues, étaient illégales et ne dou-*

nent au seigneur droit à aucune indemnité à raison de leur suppression, savoir :

Art. 3. Réserve de toutes mines, carrières, sable, pierre et autres matériaux de même nature."

Thus the alarm that Mr. de Léry is to be twice paid is wholly unfounded. But the Seigniorial decisions do not tell us whether or not mines and minerals passed to the Seignior by a general grant of lands, because the object of these decisions was to guide the Commissioners and the Attorney General not to allow the Seignior an indemnity for mines of gold and silver, and they go no further. We have, therefore, without their aid to decide the only important question in this case.

Again, the Seigniorial Court gave an authoritative answer to another of the introductory propositions of the counsel for the appellant, namely the trustee doctrine, and that the Seignior was not the owner of the soil of his Seignior. Here is what the Court declared upon that point. (Page 51 a).

Réponse de la Cour—3 et 4. § 1. * * *

"Avant la sous-inféodation ou l'accensement, le domaine utile et le domaine direct, étaient réunis pour former un domaine entier dans la personne du Seigneur.—Adoptée à l'unanimité." * * *

"§ 3. Le sous-feudataire avait de même, avant l'inféodation ou l'accensement qu'il faisait, le domaine entier, sauf les droits du Seigneur dominant, et il conservait aussi un domaine direct sur ce qu'il avait lui-même sous-inféodé ou accensé." (Also 62 a). "Réponse de la Cour.—17.—§ 1. Suivant les lois en force en Canada, avant la cession du pays, les personnes auxquelles des terres avaient été accordées par la Couronne de France, en fief et seigneurie, en avaient la propriété pleine et entière (*dominium plenum*), mais elles ne pouvaient les aliéner autrement qu'il a déjà été mentionné." Also *Id.* 63 a. "§ 2. Les seigneurs avant la concession des terres avaient dans le domaine plein, le domaine utile comme le domaine direct réunis, ainsi qu'il a été dit."

In a word the Seigniorial Court decided—that the *cessionnaires* of the land *en fief* from the king were, by the *arrêt* de Marly of 1711, obliged to concede the lands they could not cultivate, subject to *redevances*, and that they could make

no *reserves* that did not properly come within the definition of *redevances*, except it was the reserve of a right of the Crown for the Crown, and that the Seigniors remained absolute proprietors of all unconceded lands, save the rights of the Crown.

It is therefore manifest, that whatever view we take of the law—whether we hold that the right to mines and minerals passed to the Seignior by his grant *en fief* or not, the Patent of 1846 was good for the mines and minerals on all unconceded lands.

It is not less manifest, that whether the Patent of 1846 is a re-grant from the Crown to Mr. de Léry of what had already been granted to his *auteur* or not, it gave him rights independent of his Seigniorial grant, and that as regards concessions subsequent to 1846, he is not within the words or the intention of the *arrêt* de Marly as defined by the Seigniorial Court, and consequently not within the scope of the decisions of the Seigniorial Court as regards these rights. Definitively he holds the mines in unconceded lands on special grant from the Crown, not as Seignior.

The Seigniorial decisions again help us here. The reserves of mines and other analogous reserves, are declared to be illegal in the sub-inféodation, because they are not allowed by any law and are not of the *essence* of the contract. I presume by the *essence* of the contract, its nature is intended, for there is nothing of the *essence* of feudality but the recognition of a superior to whom some duty or *redevance* is due. The concession of minerals and the right to mine is certainly neither of the *essence* nor of the nature of the feudal contract, and therefore its separate grant without any question of inféodation is purely and simply a grant of mines, and its being given to a seignior is immaterial.

This brings us to another point, namely, whether, under the allegations of the Information, the question thus reduced can be the subject of a *scire facias*. The only *consitaire* who appears to raise the question is a Mr. McDonald, and it does not appear whether his concession dates before the Patent or not. Unless his title goes back prior to the date of the Patent, which it was for him to show, he has no grievance, and this for two reasons perfectly distinct: First, The rule that *L'intérêt est la mesure des actions*, binds the

sovereign as well as the subject. The only difference is, that the interest of the former may be the legitimate defence of the latter. But the Crown must plead for a real right, McDonald appears to have none. Foster, Sc. fa., p. 246.

Second: The Crown cannot revoke a Patent for rights arising subsequent to its issue. Therefore, if McDonald has a grievance arising since, he should urge it himself. In no sense is the Crown his *garant*.

This argument appears to be decisive on this branch of the case. But in order that we may not appear to decide on narrow and technical grounds, shirking thus what is fully before us, it may be well to examine the main question, namely, whether the mines and minerals passed under general words to the Seigneur, and from him, in spite of all reservations, to the *censitaire* before the Patent, or not.

On this question, a great deal of authority has been cited on both sides. The question does not appear to be one difficult of decision. The only ground for any difference of opinion seems to arise from confounding the constitution of the French monarchy with English constitutional rights. In France the king legislated as well as distributed justice; while in England the king could not at any period legislate, nor could he distribute Justice personally, or otherwise than by Justices appointed with a general jurisdiction according to the manner of the common law, unless we except, perhaps, the jurisdiction of the Privy Council. Appellant's quotations from Chitty on Prerogative are therefore only applicable to what has taken place since the cession, not to what took place before. But no one dreams of contending that if the Crown, by the Patent of 1846, granted to one person what it had already alienated to another, the latter grant is not void.

The right of the King of France to legislate, naturally involved the right to revoke grants, precisely as Parliament may, and I regret to say sometimes does confiscate property. No better instance of this power of the king of France can be found than the *arrêt* of Marly, already referred to, which has been declared binding as law, after the change of *régime* by the cession, and a non-user of nearly a hundred years.

Having this power it seems to me a fool-hardy attempt to try and establish that by the old law of France, mines and minerals buried in the ground

did not remain the property of the king, in the absence of any special grant. The claim of the king to one-tenth of the produce is the fullest recognition of this right, and we find that reservation everywhere. Why should he have one-tenth, or any part at all unless he was owner? It was not a tax, and the statutes of the kingdom exclude formally any such idea. The mining policy changed over and over again, but the king's rights remained unchanged.

We have the text of the law of Charles VI, of 30th May, 1413, registered in the *Chambre des Comptes de Paris*, 18th March, 1483, and consequently forming part of the laws of Canada, confirmed by letters of Charles VII, Charles VIII, Louis XII, and Francis I. Now these laws are no more in favor of the proprietors of the soil than they are of the seignior. They are against the enterprises of the Seigneur and his sub-feudatory, whoever he may be, and in favor of the man who actually works the mine, or causes it to be worked. (P. 3, Lamé-Fleury.)

The Ordinance of Louis XI of September 1471, registered in the *Parlement de Paris*, 27 July, 1475, regulates the mode of dealing with mines for "*notre profit, et au bien de ceux à qui la chose pourrait toucher et de la chose publique de notre dit royaume.*" It has been urged that this Ordinance gave the owner of the land a right to the minerals. But there is nothing to support that pretention in the Statute. Cap. V. says how and when they shall be excluded. This cannot create a right, although it indicates that ownership of the land would be a motive in certain cases for a grant.

The declaration of François I, of 17 October, 1520, does not seem to have been registered in Paris, and consequently is not positive law here; but it contains words which seem to imply a general rule that a title to mine from the King was necessary. "*Et défendons que dorénavant aucuns, de quelque état ou condition qu'ils soient, ne puissent ouvrir ou faire ouvrir aucunes mines, sans avoir de nous congé, vérifié de nos dits maîtres général, visiteur, garde et contrôleur général des dites mines, pour obvier aux grands abus que l'on y a faits et ferait chaque jour.*" (P. 25, Lamé Fleury—*Législation des Mines.*)

This was the end of the period of free mining. The idea of the owner or the seignior having any equitable right is disappearing in

the public interest, and Mr. de Roberval obtains a temporary right to seek for, and open mines and to take possession of abandoned mines, all over the Kingdom. This was in September, 1548.

The 2nd March, 1552, a similar privilege was granted to Guillaume Gontré, and the following year de Roberval's privilege was extended, and the seigniors were given a small share in the King's tenth. After that, there are several grants and even an alienation of the King's tenth. On the 26th May, 1563, we have a declaration that this 10th "*nous appartenant par droit de souveraineté*." It was not then a tax but a right of property.

In 1597, we arrive at what Mr. Lamé-Fleury considers as the third period, in which the policy as to mines undergoes a change. It is in some sort a return to the earlier plan of throwing the right to mine open to all persons, but to subject its exercise to the most rigorous control so as to ensure the Crown's revenue. This policy remained unchanged till Canada passed away from the King of France. At that time the right of the King of France to all the mines ungranted in France is incontestable, and it seems to be equally clear that the King of England succeeded to those rights, although he did not succeed to the right arbitrarily to set aside grants already made, as the King of France might have done. At all events the King of England ceased to have any such power from the time of the Quebec Act, when the Province of Quebec ceased to be governed as a Crown colony.

In face of the texts of the positive law of France, to which we have referred, it seems scarcely necessary to discuss the various speculations of the writers on the subject of the minerals hid in the bosom of the earth, which the learned counsel of the appellant, has, with commendable industry, placed before our eyes. It may be a part of the law of nature, whatever that may be supposed to signify *en droit*, that mines should belong to the owner of the soil, just as the earth, or a gravel pit does, but what we have to consider is the municipal law of France, and whether by it the right to minerals passed by a grant of lands to the grantee or whether it was deemed to remain with the King? It seems to be beyond the possibility of controversy, that the right did not pass with-

out special words, and therefore that on the 18 September, 1846, when the Sovereign granted the right to the minerals in Rigaud-Vaudreuil to the de Léry family, she granted what it was Her Majesty's right to alienate, and that the owners of the soil had no rights whatever, and that all they could claim was indemnity for any damages they might suffer, which is specially reserved to them in the Patent.

From this point of view, it is immaterial whether McDonald's grant goes back before the date of the Patent or not.

An involved question has been engrafted on the case, which we shall endeavour to explain in a few words, as we understand it. It involves the special grievance of the Government of the Province of Quebec, as the inheritor of the rights of the King of France, and with it Mr. McDonald has nothing to do.

It seems that this grant was not so profitable during the first 19 years of its existence as had been expected. A company formed to work it on lease from the owner, discovered that a Royalty of one per cent. was equivalent to a prohibition, and in a letter to the Commissioner of Crown Lands, they intimated that they would rather pay nothing in the shape of Royalty, or so little as not "to work a hardship." In exchange for the remission of the Royalty or its reduction to a *minimum* they agreed to "waive in favour of the Government all conditions specified in the Patent precedent to the payment of the Royalty agreed upon, except those incident to the extraction and reduction of the precious metals and their proper submission to the officers of the Government for valuation." This letter was dated 4th Dec., 1865, and on the 10th May, 1866, the Commissioner made a report on the proposals of the Mining Company, which concludes with the following recommendation:—

"The undersigned considers that it would be best to put this Company on the same footing as regards tax as others, and to have the disputes between it and the *Censitaires* as to the ownership of the gold in the conceded lands settled within a reasonable time, and has therefore the honor to recommend, without expressing any opinion as to the validity of the Patent or the relative rights of the assignees of the Patentees, and the *Censitaires* and representatives, that the Company, not

"working any lands but those now conceded or those as to which they acquire the right to do so from the *Censitaires*, the Crown do agree to receive from the former, in lieu of the Royalty stipulated on the Letters Patent, similar fees to those provided by the 'Gold Mining Act,' on condition that they do within five years from this date settle the disputes with the *Censitaires* and representatives as to the ownership of the gold on private lands, either by making bargains with the owners, or by taking such legal measures as will demonstrate that the Company and not the *Censitaires* are the owners of the gold on private lands, and that failing adjustment of these disputes within a reasonable time, the Company shall abandon its pretension to the gold on conceded lands, so that the department may deal with the *Censitaires* as owners of the gold, with the additional proviso that lawsuits of the Company pending at the termination of the period of five years will be allowed to go to the final decision, ordinary diligence being used to obtain such decision."

This report was approved of by the Governor-General in Council, and accepted it is said, by the DeLéry Mining Company, and it is contended that it binds the DeLéry family, becomes a portion of the original Patent, and that the failure to fulfil the stipulations of this report, is a good cause for setting aside the Patent of 1846.

The only acceptance by the Mining Company was their letter of 4th December, 1865, and with this letter the DeLéry family had nothing to do. It was a transaction between the Company and the Government which amounts to this, that as the Government would not get any Royalty, because the quartz would be crushed and not smelted, it would take the Royalty mentioned in the Gold Mining Act.

But it is argued, if the DeLéry family are not bound by this agreement, they have failed to carry out the conditions of the Patent. There are two answers to this: First, there is no Royalty under the Patent to pay; second, if the Government chose to absolve the tenants of the grantees from the obligations of the Patent, it cannot find fault with the grantees either for the non-fulfilment of the original obligations, or of the substituted ones, unless the grantees have

specially bound themselves to the new arrangement. There is no evidence of this.

This equally answers the pretention that the de Léry family were to settle with the *censitaires*, one way or other, either by suit or by arrangement. But there is still another answer to this last pretention, namely, that there are no suits in existence, except the one before us. Now can it be seriously pretended that the Attorney-General should succeed in setting aside the Patent of 1846, not on the merits, but because he is urging the rights of Mr. McDonald? If so, he had only to bring a suit, and shut the mouths of Respondents.

In order that there might be no chance thrown away, irregularities are complained of in the Patent itself. There was not any warrant, it is said, for the Bill, and no warrant for the Privy signet, nor no signet itself, nor warrant for the great seal, nor the great seal itself.

We are not aware that all these formalities are in use here. There is no Privy Signet. The great seal and the signatures of the proper officers are all the warrant required to authenticate a document of that kind, and if the great seal was used without warrant, or if the signatures were improperly attached, the appellant should have established this.

It has been also said there was a mis-recital, and that the original grant was not to the *auteur* of respondents. This is covered by an admission.

We are therefore to dismiss this appeal, and to confirm the judgment of the Court below quashing the Information of the Attorney-General.

Judgment confirmed.

C. Fitzpatrick for the Crown.

G. Amyot for the DeLéry Gold Mining Co.

W. & A. H. Cook for the other defendants.

GENERAL NOTES.

Mr. Baron Pollock presided recently at the annual supper to discharged criminals, commonly called the "Thieves' Supper," in Little Wild street, a narrow thoroughfare in the very centre of vice and crime. The guests were principally composed of ticket-of-leave men, most of whom are still under police surveillance. Baron Pollock, in an after-supper speech, asked all present to take "hope" and "courage"—"Hope that they might retrieve the past," and "Courage to listen to the still small voice within them."

The Legal News.

VOL. VI. DECEMBER 29, 1883. No. 52.

THE COURT OF QUEEN'S BENCH AND ITS SITTINGS—HOW TO TURN THEM TO ACCOUNT.

The Bench and the Bar will not gain much by amateur suggestions. The *amicus curie* is a personage of very doubtful utility. In his wisdom he tells us that if pleaders talked less, if judges interrupted less, and lawyers and judges did not wrangle, cases would be more promptly heard. As a matter of fact no other portion of the community, brought into such sharp conflict of opinion, in matters of the deepest interest, show so much reserve as judges and lawyers. If they exhibited as much disregard for one another's feelings as the contending parties in the House of Commons, or the shareholders at a bank-meeting when there is no dividend, or even as co-religionists in the vestry-room, Courts of Justice would become more entertaining than the "ring" or a bull-fight.

It requires experience, careful study and a frank admission of our short comings to get on to the line of practical improvement.

In this Province we begin with the great advantage of having the best system of law in the world, and the schools, established within the last thirty-five years, have done much to develop legal knowledge: but generally we lack training, and our system of procedure is simply detestable. It is neither French nor English, but a hideous jumble of both.

Want of training is very manifest in pleading both written and oral. When it is said a pleader speaks too long, it is only another way of saying he pleads badly. No one intends to weary his audience, for the hearer has always some measure of protection—he can cease to listen. On the other hand it is manifest that an argument to the point, and systematically arranged, is of immense use, provided the judge is prepared to listen and to understand it, and if he is not to throw the case into a bag after the hearing, and to leave it there till all that has been said is forgotten. The union of the two branches of the profession is a great difficulty in the way

of good pleading, and renders special training in this important matter doubly needful. Either from economy, or from the idea that he knows more of the case than he can communicate to counsel, or from vanity, the attorney invariably pleads his own case, whether he be eloquent or not, or whether he hesitates or stutters, or whether his voice is melodious or monotonous, or whether he has any aptitude for the clear exposition of a principle or for the striking grouping of facts or not. All these deficiencies, as well as every act that depends mainly on method and good taste for its efficient performance, can be to a great extent affected by education. Therefore it is to the schools we must look for a remedy in these particulars.

The legislature must aid us in procedure. The first and greatest difficulty is the taking of evidence. Theoretical writers constantly tell us that the written evidence should be as nearly in the words of the witness as possible, and doubtless, in the abstract, the rule is true. But when in practice, this is attempted to be carried out, a mass of rubbish is collected, in the midst of which the evidence is as likely to be lost as the traditional needle in the bottle of hay.

The cure for loose and useless accumulation of evidence is to be found firstly, in scientific pleading. Unfortunately that unrefined critic "public opinion" is vehemently opposed in the present day to intellectual distinctions, he finds them difficult and wearisome, all of which we readily admit; but so are the great problems of mathematics, and so also it is difficult and very wearisome to dig. The cure is to be found secondly in keeping the whole case, from the beginning to the end, under judicial control. One of the schemes devised for this is to have a *juge d'instruction*. The judge of first instance should be the *juge d'instruction*, and his notes, and not the rambling story of the witness, should be the evidence in the case. The objection is, that the judges have not time. There is nothing in this; evidence can be more easily taken by a judge without a jury than with one. The real impediment is the prejudice of old attorney, who likes to nurse his case, and, by adjournments, to have an opportunity of plastering up holes. These plasterings are very generally untrustworthy evidence, or they are unsuccessful.

The record being built up on logical principles, and confined to legitimate bulk is easily managed. Make-weight arguments are excluded or easily exposed, and sentimentalities, often dignified by the name of equity, become transparently ridiculous.

In procedure we have been going backwards lately. Let me hope progressive people will not be too much shocked, when the introduction of stenography is indicated as the retrograde step. To stop the cry of indignation, by which my observation may be overwhelmed, let me say at once, that it is the application to law of stenography, while it is a hidden art to almost the whole world, to which I object. When, after transcription, the so-called testimony is submitted to the court, it is not sworn testimony of what took place, but the substituted oath of the stenographer of what one or many witnesses have said. It is in reality hearsay evidence, and no more.

The next point in which our practice is faulty is in the making of factums. The parties should be constrained to make one case, from which all repetitions should be excluded, and into which no argument should be admitted. It should consist of a faithful statement of the pleadings, then of the judgment or judgments appealed from, then of the propositions of law succinctly stated, also the summing up of the evidence, and then the evidence itself.

The last improvement is in the formation of the court, and it is the most important. A Court of Appeal should never consist of more than three judges. They will do more work, and do it better, and more easily for themselves, than a greater number. The moment the number of three is exceeded, the faults of the committee begin to appear. It is said that two heads are better than one, granted; but no proverbial philosopher ever said that five were better than three. It is so well known that good counsel is not to be obtained from numbers, it is hardly necessary to analyse the causes of the fact. In general terms, however, it may be said, that truth is proclaimed by the many, but it is discovered by the few. Proverbially it lies at the bottom of a well, it does not float like cream on a milk-pan.

Simple and easy as are the alterations proposed, the writer has no ardent hope of seeing them speedily brought about. Selfishness, jealousy

and prejudice will combine to prevent even their candid discussion; but with the most perfect faith that no true word is ever thrown away, and in the belief that there are some truths in these papers, I close my comments for the present, on "the Court of Queen's Bench and its sittings." R.

OBLIGATIONS OF A TRUSTEE.

When the Supreme Court surprised our legal world by its judgment in *Miller & Coleman*, we were told that the decision was in conformity with English law. We received this assurance with some hesitation, for although we are supposed to be governed, in civil matters, chiefly by the laws of France, and therefore we do not make a special study of English law, yet it was difficult for us, in our ignorance to believe, that the most practical of peoples could possibly have laid down principles leading to absurd results. The following report of a case recently decided in England, establishes, on the very highest authority, that the law there regulating the obligations of a trustee as to diligence is precisely the same as it is in the Province of Quebec:—"In the House of Lords on Monday, the Lord Chancellor, and Lords Blackburn, Watson, and Fitzgerald gave judgment in the appeal of *Spaight et al v. Gaunt*. Mr. Gaunt, trustee under the will of A. Bradford, manufacturer, had entrusted £15,275 to a stockbroker, named Cooke, to invest. Cooke, however, appropriated the money and absconded. His estate only yielded 6d in the pound. In an action brought against the trustee, Vice-Chancellor Bacon ordered him to make good the sum lost and to pay costs. This judgment was however set aside, in the Court of Appeal. The late Sir George Jessel, in the course of his judgment, said that a trustee ought to conduct the business of his trust in the same manner as an ordinary and prudent man would conduct his own business; but beyond that there was no liability or obligation upon him. It was not reasonable to make a trustee, who was not paid for his services, adopt further and better precautions than an ordinary and prudent man of business would adopt, and if it were otherwise no one would be a trustee. In consequence of this judgment the appellants appealed to their lordships, and sought to make the respondent liable for a breach

of trust. Their lordships, however, affirmed the judgment of the Court of Appeal, and dismissed the present appeal with costs."

TRADE MARK.

It appears by the following notice of a recent case that a man may use his own name so as to be a fraudulent appropriation of the trade mark of another firm:—"Mr. Justice Chitty gave judgment on Wednesday in an action of *Clayton v. Bell*, which was brought by the present proprietor of the business of Day and Martin, blacking manufacturers, for an injunction to restrain two men named Enoch Day and Thomas Martin from using the words "Day & Martin" on labels for bottles or packages of blacking. Day was an assistant to an ironmonger in Southsea, and Martin the keeper of a small shop at Southsea, for the sale of sweets and ginger beer. Mr. Justice Chitty said he was satisfied that the defendants intended fraudulently to appropriate the name of the plaintiffs' firm for the purpose of obtaining a sale of blacking made by the defendants, and he granted the injunction with costs."

A CHEQUE CASE.

The Lord Chancellor and Lords Blackburn, Watson, and Fitzgerald had before them in the House of Lords recently the case of *John McLean v. The Clydesdale Banking Company*. It was an appeal from a decision of the Court of Session in Scotland, affirming two orders of the Sheriff's Court which were in favor of the respondents. The question was whether the appellant was entitled to countermand payment of a cheque after it had been endorsed to a third party for value. It appeared that a person named Cotton kept an account with the Clydesdale Bank in Glasgow, and on the 14th of January, 1882, the sum at his debit amounted to £1,970. In the course of the day sums amounting to £1,941 were paid in, including a cheque for £265 2s. 6d., drawn by John McLean in favor of Cotton. This cheque was, to the extent of £250, an accommodation bill given by the appellant to Cotton. When the cheque was presented to the Bank of Scotland, the bank refused to honour it in consequence of instructions received from the appellant.

The appellant did not dispute his liability on the cheque to the extent of £15 2s. 6d., being the amount for which he received value, but he denied any liability for the remaining £250. The respondents contended that the appellant was not entitled to stop payment of the cheque after it was endorsed to them for value. Their lordships, without calling on the counsel for the respondents, gave judgment, dismissing the appeal with costs. In their lordships' view there could be no doubt that cheques under the existing laws of England and Scotland were negotiable, and the property in them would be passed by endorsement for value. In this case the payee had endorsed the cheque over to the bank, and the consequence was the respondents stood now in the position of owners of the cheque and entitled to sue upon it."

THE LAW'S DELAY.

There is so much clatter over delays in the administration of justice, that the minds of people receive a very distorted impression of the facts. It is not uncommon to hear people speak as if a determined fight in the courts meant at least ten years' litigation, and timid persons are no doubt often frightened into compromise or abandonment of their lawful rights rather than run the risk of having a suit hanging like a mill-stone round their necks. In particular the Court of Appeal of late has been held up as a bugbear. Celerity, of course, is desirable, so long as the work is well done. But let us take an illustration of the actual delay. The case of *Arpin & Robillard* was decided by the Superior Court, 9th January, 1883; the appeal from that judgment was heard in its turn on the roll on the 15th December, 1883, and was decided 21st December, 1883. This does not indicate extraordinary delay. Doubtless, it may be said with truth that the same result could have been attained within two months instead of twelve, if the roll had been clear; but our impression is that in the olden time, when there were not more than twenty-five or thirty cases on the roll, the same delay often occurred between the judgment of the the first Court and that of the Court of Appeal. Of course, if the lawyer for the appellant takes six or eight months to prepare his factum, the case will not get its proper

place on the roll, but he suffers from his own want of diligence and not from the block of business. As to the lower Courts, business has never been more promptly dispatched. A writer signing "M." (p. 400), in whose initial and style, it is not difficult to recognize a learned Judge who recently retired from the Superior Court, has shown how expeditiously the work of the Court of Review is performed. In the Court of first instance cases are tried and disposed of with a celerity never known before. In fact, the more work both bench and bar have to do, the less disposition is there to linger over cases.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

QUEBEC, December 4, 1883.

DORION, C.J., MONK, RAMSAY, TESSIER & BARY, JJ.

ROCHETTE, Appellant, & OUELLET, Respondent.

Security in Appeal—Hypothecary Action.

1. *Where the defendant in a hypothecary action appeals, the sufficiency of the sureties, or the amount to be deposited as security, is not to be calculated on the value of the real estate, or on the amount to which the defendant may be condemned should he fail to délaisser. Nevertheless the bond should be in the terms of Art. 1124 C. C. P., and the Prothonotary ought not to limit its terms to the payment of costs.*
2. *When the defendant makes a deposit instead of giving security, which the Prothonotary has declared should be for the payment of costs only, a motion to set aside the deposit as insufficient, will be rejected, if it appears to the Court that the deposit is sufficient to cover any condemnation in money, whether for costs or otherwise, to which the defendant is liable to be condemned, and the Prothonotary's order will be amended.*

Motion to reject the appeal owing to insufficiency of the security. The action was hypothecary. The prothonotary, before whom the

security was given, decided that the appellant was only obliged to give security for the costs. The following is the judgment of the Court:—

"Considérant que le cautionnement pour appeler d'un jugement de la Cour Supérieure, doit être donné dans les termes de l'article 1124, du Code de Procédure Civile, et que dans l'espèce le Protonotaire n'avait pas le droit de restreindre le cautionnement et d'ordonner qu'il ne serait donné que pour les frais seulement;

"Mais considérant que pour déterminer la solvabilité des cautions ou leur suffisance, le juge ou le protonotaire recevant le cautionnement doit fixer une somme pour laquelle les cautions doivent justifier de leur solvabilité, et que d'après la loi et la pratique constante de cette cour, cette somme doit égaler les condamnations en argent ou en choses mobilières appréciables en argent auxquels la partie appelante peut être condamnée;

"Et considérant que lorsque la partie appelante, au lieu de donner un cautionnement, offre de déposer une somme de deniers pour tenir lieu de tel cautionnement, l'appréciation de la somme à être déposée doit être basée sur la même règle;

"Et considérant que sur une action hypothécaire dont l'objet est le délaissement d'un immeuble, la suffisance des cautions, ou du dépôt qui doit être fait au lieu de cautionnement, ne doit pas être estimé en y comprenant la valeur de l'immeuble dont le délaissement est demandé ou de la somme à être payée dans le cas où le défendeur ne délaisserait pas, mais seulement des condamnations en argent auxquelles le défendeur peut être condamné;

"Et considérant que l'appellant défendeur en Cour de première instance, a choisi de faire un dépôt de \$350 au lieu de donner un cautionnement;

"Et considérant que cette somme est suffisante pour rencontrer les condamnations en argent auxquelles l'appellant peut être condamné en cette cause;

"La Cour mettant de côté l'ordre donné par le protonotaire, déclare néanmoins que le dépôt fait par l'appellant est suffisant pour rencontrer les condamnations qui pourront être prononcées contre lui, et renvoie la motion de l'intimé, mais sans frais."

Motion rejected.

COURT OF QUEEN'S BENCH.

QUEBEC, December 7, 1883.

DORION, C. J., MONK, RAMSAY, TESSIER, BARY, JJ.

BELANGER (deft. below), Appellant, and BAXTER
(plff. below), Respondent.*Promissory note obtained from the maker by fraud—
Action by endorsee (before maturity) cognizant
of the fraud.**Where the transfer of a note by indorsement is made
before it becomes due, but the evidence shows
that the note was obtained from the maker by
fraud and that the holder was aware of the
fraud, the case does not come within the general
rule laid down in C. C. 2287, and the onus of
showing that he is in good faith falls upon the
holder.*

RAMSAY, J. This is an action on a promissory note dated 3rd January, 1882, and payable twelve months after date. The plea is that the defendant being a person of little education, had signed this note believing he was signing an agreement by which he was to become the agent of C. B. Mahan & Co. for the sale of agricultural instruments. The transaction is clearly one of those swindling concerns of which we have seen so many got up to dupe unsuspecting country people. It is evident that this note would have been valueless in the hands of Mahan & Co., but it was transferred to the respondent before it was due—sometime, it appears, in December, 1882. The only question seems to be whether the respondent is a *bona fide* holder. It is argued that Walters was, and that he holds from Walters. But the fact is not so. Walters only held the note as collateral security—he did not discount it “out and out” as he said. He held it with a number of other notes amounting to a very large sum of money, and he was disinterested in the whole for \$6000, less than half the face value of the notes. A note obtained by a gross fraud of this kind, and out of the ordinary course of business, is already open to suspicion, and the *onus* of showing that the plaintiff is a holder in good faith and for value readily falls upon him. This was formally decided in England, *Fitch & Jones*, 5 E. & B. 245; it was also decided here before the code in a case of *Wuthall & Ruston et al.*, 7 L. C. R., p. 399. It is, however, contended that art. 2287 C.C. has laid down a new rule on the point. This Court has

been unable to adopt this view. There is nothing to indicate any intention on the part of the legislature to change the existing law. Art. 2287 represents Article 9 of the 7th Report of the Commissioners, and on it (Art. 9) they make this remark:—

“The rule declared in Article 9, as to the right to transfer a bill by endorsement after it is due and the effect of such endorsement, admits of no difficulty with us at the present day; it has been the constant usage derived from that of England, and is recognized in a number of cases, one of which is reported and is cited under the article.”

The case referred to is that of *Wood et al., & Shaw*, 3 L. C. J., p. 175, which does not support the pretention of the respondent. The sense of the article is this, the title of the holder is perfect on the face of it, but the article does not say that the title continues to be perfect when the evidence gives rise to the presumption that the holder is in fraud, and has not given value. We have therefore maintained the old principle in two cases, one of *Robinson & Calcott*, reviewed in 2 *Thémis* 331, the other that of *Morin & Grenier*, decided in Montreal, on the 15th of September, 1877.

As to the facts of this case, it appears that Baxter held the note on an order from Mahan, who fled the country about the beginning of November, and with whom Baxter says he had had no communication since his flight; but he admits that he was aware of the rumours as to these notes having been obtained fraudulently at the time of Mahan's flight, and it appears he only produced his order in December, weeks after Mahan had disappeared. Then, when we come to examine the condition on which the notes were given up by Walters, we find that it was upon payment of Mahan's indebtedness. The transaction, then, has all the outward appearance of a withdrawal of the notes by Mahan's agent, and Baxter has not attempted to show that he withdrew these notes with his own money. We are therefore of the opinion that the judgment in this case must be reversed with costs of both Courts.

The judgment of the Court is as follows:—

“The Court having heard, etc., on the appeal from the judgment of the Superior Court sitting at the city of Quebec, in the Province of Quebec, in a suit in which James Baxter was

plaintiff and Victor Bélanger was defendant, to wit the judgment rendered on the 9th day of July, 1883, and having deliberated;

"Considering that the note which formed the basis of the said action, to wit, a note purporting to be drawn at Lotbinière on the 3rd January, 1883, payable 12 months after date to the order of C. B. Mahan & Co., and signed by the said defendant now appellant, was obtained from the said appellant by the said Mahan & Co. by misrepresentation and fraud;

"Considering that it appears that the holder of the said note, to wit, the said James Baxter, was aware of the said fraud, and that he has failed to prove that he gave value for the said note;

"Considering further that it appears that the said plaintiff got possession of the said note, after the departure of the said Mahan from Montreal, from one Walters, who held the said note with others of a similar kind, as collateral security for advances to Mahan, on the order of Mahan and on the payment of what was due by Mahan to Walters;

"And considering that this transaction gives rise to the presumption that Baxter got these notes as agent of Mahan, and that he holds them for Mahan, which presumption is not repelled in any way;

"Considering that Mahan could not recover on the said note;

"And considering there is error, etc.;

"Doth reverse, etc., and doth condemn the said Baxter to pay the costs incurred in the Superior Court as well as the costs of this appeal."

Judgment reversed.

COURT OF QUEEN'S BENCH.

QUEBEC, December 7, 1883.

DORION, C.J., RAMSAY, TESSIER, CROSS & BABY, JJ.
HÉBERT, Appellant, and CHOQUETTE, Respondent.

Election Act, 38 Vic. (Que.) c. 7—Proof of Election—Inducement to vote.

The holding of an election is matter of record, and in an action for a penalty, must be proved by the written certificate of the returning officer.

Suspicious are not to take the place of proof in prosecutions for electoral frauds: the corrupt inducement to vote or to refrain from voting must be clearly proved.

RAMSAY, J. This is an action for a penalty under the Quebec election law, 38 Vic. cap. 7, for bribery. The appellant was found guilty and was condemned to pay \$200, and in default of payment to be imprisoned for six months. The appellant contends that there is no proof to support the action :—

1st. That there is no evidence of any election.

2nd. No evidence of bribery.

Respondent answers that this is a Circuit Court case; that there is no declaration in writing requiring the notes of evidence to be taken down in writing (1074, C. C. P.), and that consequently there is no appeal except on law.

It seems to us that the respondent cannot fairly take up this ground, for the notes were taken and a stenographer was sworn to take them correctly, and these notes are filed.

With regard to the appellant's pretention, it appears that the article does not require, in an action for a penalty any mention of the writ of election or the return thereto. (Sect. 293.) Again, sect. 295 enacts that "it shall not be necessary at the trial of such suit, to produce the writ of election, or the return thereto, nor the authority of the returning officer, but parol evidence of these facts shall be sufficient proof of the same."

"The certificate of the returning officer to that effect shall constitute sufficient proof of the election having been held, and of the fact of any person therein stated to have been a candidate having been such candidate."

It is easily understood that the object of the legislature was to avoid the inconvenience of depriving the Assembly of its officers, and of its archives to make a formal proof of a fact of public notoriety; but it was not intended to substitute parol for written evidence where there was no inconvenience in producing a written certificate. At any rate the legislature has not gone so far. It seems that parol evidence of the writ, of its return, and of the authority of the returning officer will suffice, but that it requires the certificate of the returning officer to establish that the election was held and who were the candidates.

If this be the requirement of the law then the evidence is incomplete, for no one has established who was returning officer, and consequently there can be no valid certificate. Without a certificate of this kind, we don't know that there was an election. Again, we have no more verbal evidence that there was a writ, or that there was a return thereto, than as to who was returning officer. All we have is general evidence that there was an election, but on what authority it was held, no one seems to have thought it necessary to enquire.

It is needless to say that the holding of an

election is matter of record, and that as record it must be proved, except in so far as the stringency of this rule is set aside by positive enactment. Nowhere has the law pretended to say that general evidence of an election would suffice, and I fancy the Legislature will pause before making such a dangerous innovation.

Although this action is called an action of debt, it is so-called only to avoid technical difficulties, but for what is of importance, as the evidence of the offence, it is to be considered as a penal action. Without going further we are to reverse.

But coming to the merits, it seems to me the action is not proved. It is quite evident that, according to no ordinary principle will suspicions do to establish such a case, and that with regard to presumptions, which generally come to aid in the proof of offences, they are inconclusive in these cases. In another case, *Lapierre & Laviolette*,* I have endeavoured to draw attention to the phraseology of section 249 of this act. It seems to me that the offence sought to be brought home to the appellant is a violation of sub-section 1, that is, it is a gift to Bouchard's wife to induce this man to vote for one of the candidates. This is a specific charge, and the statute requires that it should be specific.

Now what is the evidence in support of it? I take the evidence of Bouchard, his wife and the girl Isabelle, for I think the attempt to break down their credibility is totally unsuccessful. They are poor people living to some extent, on charity, and very naturally, and I may add, not improperly under Mr. Bernatchez's influence. Now what they tell us is this, that the appellant called and asked Bouchard if he would vote; that Bouchard told them he would, but that he would not say for whom; and all agree that the appellant said he was right in this, and that he did not ask him to vote for Mr. Fortin, nor make any bargain with him that he should. After that appellant gave Bouchard's wife \$5 without any further stipulation or understanding.

I can fancy that Hebert may have thought that giving \$5 to this semi-mendicant, who had not a cent in the house, was likely to produce a friendly feeling to appellant, but I deny that any one has the right to say it was

given as an inducement to vote, when all the parties swear that there was no understanding of the sort between them.

To say that charity must cease because an election is going on appears to me as ridiculous as it is infamous. The sincerity of the advocates of such views may be judged by their practice. They denounce giving a few dollars to a beggar woman for fear it may bias her husband in favor of the donor, and they set forth the pecuniary advantages to be derived by manufacturers or farmers from free trade or protective tariffs as the most unanswerable reason for voting for this or that candidate. Acts of Parliament will not, I fear, be found to be very efficient means of making people patriotic. If parliamentary elections have the effect of inducing even spasmodic fits of charity, it is not a totally despicable gain. But whatever may be the abstract view upon these matters, the legislature has not yet laid down the rule that suspicions are to take the place of proof in all prosecutions for electoral frauds.

I am to reverse, not only on the absence of proof of the election having been held, but also on the absence of proof that the \$5 was given to the mendicant woman to induce her husband to vote or to refrain from voting.

The Court is unanimous in reversing the judgment.

Sir A. A. DORION, C.J., was to reverse on the first point, but he thought there was evidence to justify the Court in presuming that the \$5 was given to induce the husband to vote.

Judgment reversed.

COURT OF QUEEN'S BENCH.

MONTREAL, Sept. 27, 1882.

DORION, C.J., RAMSAY, TESSIER, CROSS & BABY, JJ. LAPIERRE (def. below) appellant, & LAVIOLETTE (plff. below), respondent.

Quebec Election Act—Inducement to refrain from voting—Evidence.

The appellant complained of a judgment rendered in the District of Richelieu, condemning him to pay a penalty of \$200 for having committed an act of corruption within section 249 of the Quebec Election act.

It appears that an election for the Quebec Legislature was in progress in the County of Berthier, and the 29th December, 1880, was

* The case of *Lapierre & Laviolette*, referred to by Mr. Justice Ramsay, turned entirely on evidence, and has not been reported. By way of completing the above report, we give a note of it as an appendix to the present case.

fixed for the voting. The appellant was a supporter of Mr. Sylvestre, the Liberal candidate. The day before the voting he got a number of voters to go to Montreal on the pretence of getting various articles for him, but really, as was charged, to procure their absence from the polls. Among those who it was alleged were thus tampered with was Adrien Hétu. The appellant paid Hétu \$6 to go from Lavaltrie to Montreal for a load of 1,000 pounds, but the load turned out to be a packet of cotton of about ten pounds weight. Joseph Prud'homme got \$5 to go to town for a small package of whiskey. The Court below found that the engagement of Hétu was a sham, and that the money was paid to secure his absence from the poll, he being a Conservative. The penalty of \$200, or six months' imprisonment, was therefore inflicted.

RAMSAY, J. (*diss.*) This is an action for a penalty under the Quebec Election Act of 1875 (38 Vic. c. 7, sect. 249). This section contains five sub-sections, the first four of which are directed against corrupt agreements to induce people to vote or to refrain from voting at an election. The fifth and last sub section is legislation of a peculiar character. It makes it penal to give money to another with the intention of preventing an elector from voting, although there be no corrupt agreement, that is to say, without any corruption on the part of the recipient. I may at once say that this is not the action brought in the present case, and which without confession on the part of the defendant is not susceptible of proof; for I take it there can by no possibility be any presumption of a malicious intent arising out of the doing of an absolutely innocent act. The action is very loosely drawn, and if it can be sustained at all it must be as an action under sub-section 1, that is, as being the giving of money in order to induce one Adrien Hétu not to vote. There is no direct evidence of any such contract, nor indeed is it pretended that there is. But plaintiff says that there was a simulated bargain that Hétu should go to Montreal on the polling day, pretending to get a load of goods for appellant, that appellant had no load of goods to carry, that Hétu was to return empty-handed after the polling was over, so that he could not vote, and that for this pretended service he was to get from appellant \$6. I think I may safely say that of this contract so elaborated there is absolutely no direct evidence either. The appellant was not examined, and Hétu distinctly denies that there was any such agreement, and no witness testifies to having any knowledge of there being any such bargain between appellant and Hétu. But plaintiff says: "That is not necessary; I have a right to presume

that the appellant is guilty and that a contract did exist between them, because, 1. Lapierre did return without a load but only with a small bundle of little value. 2. Because Hétu was a supporter of the Conservative candidate, to whom the appellant was strongly opposed. 3. Because appellant did engage another person to go on an errand to prevent him from voting, if we are to believe the story of Mr. Joseph Prud'homme.

It appears to me that these presumptions are unfounded and inconclusive, and that the evidence of a different act of corruption is inadmissible. There is no doubt that a guilty intention may be inferred from other acts of a like nature. But this class of evidence is admitted with great care, and I take it there must be a wrongful, or at least an ambiguous act to qualify. An illustration will make my meaning clear. I find A without right in my house by night and I accuse him of being there with intent to commit a felony. In proof of this charge I can prove that he was there before and did commit a felony; but if I find a man walking on the road before my house where he has a right to be, I could not prove that he had any felonious intent in being there, by showing that he did walk there on a previous occasion when he did commit a felony.

I therefore say that all the evidence of Prud'homme is illegal. It is just as though you proved that a man had stolen because he had stolen on another occasion. In the same way, that Hétu brought back no load proves nothing. I am to reverse.

DORION, C. J., also dissented on the ground of the insufficiency of the evidence. There was no sufficient evidence against Lapierre. He engaged a man named Hétu to go to Montreal and get a load. There was no time fixed for him to make the trip, except that he was to bring the load before New Year's Day. There was no mention of the election, nor any request as to not voting. He might have gone to Montreal and returned in time to vote, or he might have voted first and then brought the load. Colorable intention was not proved. His Honor considered the law in question a good one, but there was no evidence on which to rest a judgment against Lapierre. It was proved, moreover, that he did not meddle with the election.

The majority of the Court held that the judgment against Lapierre ought not to be disturbed. The circumstances connected with the engagement of Hétu were in the opinion of the majority such as to lead to the belief that the intention was to secure his absence from the poll.

Judgment confirmed, Dorion, C. J., and Ramsay, J., dissenting.

Piché, Q. C., for the appellant.
Gagnon, for the respondent.

GENERAL INDEX TO SUBJECTS.

VOL. VI.

	PAGES
ACCEPTANCE of Goods, Proof of.....	363
ACCEPTANCE of Succession.....	26
ACCESSION, C.C. 435.....	381
ACCIDENT INSURANCE POLICY, forfeiture.....	368
ACTION, Against Railway Commissioner, Quebec.....	222
By shareholder to set aside lease by Company.....	327
<i>En déclaration de paternité</i> , proof of paternity.....	170
<i>En réintégrande</i> , Where it lies.....	4
For illegal arrest, Probable cause..	22
Personal, after bringing hypothecary	107
To rescind transaction, tender of res- titution.....	216
ADMINISTRATION OF JUSTICE.....	400
ADVERTISING CONTRACT.....	328
ADVOCATE AND CLIENT, An incident versified	208
ADVOCATE, Fame of the.....	25
ADVOCATE, Female.....	368
ADVOCATE'S PRIVILEGE.....	394
AFFIDAVIT for capias, sufficiency of.....	3
AFFIRMATION, Substitution of, for oath	73
AFFIRMATION BILL in England..131, 160, 161	225
AGENCY, person performing duties of man- ager ..	215
Privileged statement of agent to principal.....	231
AGENT authorized to bet.....	177
Commission on negotiation of sale of property	202
ALIMENTARY ALLOWANCE, offer of children to board parent.....	60
ALIMENT, misconduct of plaintiff.....	84
" " action by son of age, 133,	194
ALLEYN, Death of Mr. Justice.....	272
ALTERNATIVE OBLIGATION.....	204
AMERICAN BAR ASSOCIATION.....	257
AMUSING DEFINITIONS.....	88
ANECDOTES, Erskine.....	32

	PAGES
A Danish magistrate.....	32
Artifice of Chinamen.....	208
A persevering litigant.....	360
The drover and the butcher.....	368
APPEAL of firm.....	216
Business in.....	34
Decisions in 1882	57
Business of March Term, 1883.....	105
Accumulation of business.....	369
Business of November term, 1883..	378
Progress of business.....	402
APPEAL TERMS, The additional.....	361, 379
APPEAL, COURT OF—The Court of Queen's Bench and its sittings...377, 393, ...	401, 409
APPEAL by curator.....	325
Interlocutory judgment.....	154
Judgment which does not dispose of case.....	155
From order of judge appointing sequestrator.....	326
APPEAL TO SUPREME COURT, Review of order in chambers refusing leave to appeal.....	51
Interest of Appellant must be \$2,000	52
APPEAL TO PRIVY COUNCIL from Supreme Court.....	81, 257
APPOINTMENTS.....	8, 352, 392
Queen's Counsel.....	227
ARREST, action for illegal.....	22
Illegal, responsibility of municipal corporation	60
ASSAULT CASE, A singular.....	368
ASSESSOR, undervaluing his own property..	232
ASSIGNEE, Official, appointed assignee by creditors.....	323
ASSIGNMENT by insolvent trader.....	123
ASSUMED NAME of author not trade-mark.	87
ATTORNEY'S RIGHTS, where parties settle..	49
ATHEISTS as witnesses.....	17

CONSOLIDATION OF DOMINION STATUTES, 120, ... 185, 208	CRIMINAL LAW, Charge of Mr. Justice Ram- say in <i>Reg. v. Milloy</i> 100
CONSTABLE entitled to notice of action.... 276	Description of Stolen Property..... 231
CONTEMPT OF COURT 111, 173	Misspelling in verdict..... 237
Publication of pleadings in pending suit..... 208	Evidence..... 239
Imprisonment for..... 241	Larceny..... 239
CONTRACT, Rescission for failure to comply with terms..... 91	Open and public place..... 264
Speculation in stocks on margin... 93	Rape..... 264
For service..... 105	Receiving stolen goods..... 269
Sale of business and good will.... 202	Omission of word "feloniously" in indictment..... 271
Default 220	Larceny of water in pipes..... 400
Extorted by threats..... 234	What constitutes bigamy..... 400
For advertising..... 328	CRIMINAL STATISTICS of Canada..... 201
CONTRAINTE PAR CORPS, asked for after judgment awarding damages..... 86	CRIMINAL PROCEDURE, Period of imprison- ment..... 116, 121
CONTRIBUTORY NEGLIGENCE..... 110	Codification of, in England,..... 297
COPYRIGHT..... 289	CROWN, Rights of, in minerals..... 402
CORPORATION, authority of president to sign promissory note..... 171	CUMULATIVE SENTENCES 56
See MUNICIPAL CORPORATION.	CURATOR to délaissement..... 336
COSTS of the Belt case..... 48	CUSTOM of Port..... 146
Revision on question of..... 55	of Trade 308
Proportion of..... 84	CUSTOMS LAWS, notice of claim to goods seized..... 346
Of hypothecary action 107	CURATOR to interdict must be authorized to appeal..... 325
In excess of amount of condemnation 357	DAMAGES, Increasing number of actions for 1
Where inscription in Review is de- sisted from..... 336	Against municipal corporation for improper removal of name from list of voters..... 23
COUNSEL FEES..... 49	Slippery side-walk..... 93
COUNSEL, Interference of Court with conduct of cause..... 201	Wrongful dismissal of employee... 105
COUNTRY DAY in town..... 305	Accident on highway..... 106
COUPON BONDS, overdue paper..... 240	Collision between vehicles..... 110
COUPONS, Interest on..... 385, 388	Inducing a person to cross the inter- national line for the purpose of arresting him..... 228
COURT FURNITURE, sale of..... 88	DEMURRAGE, Detention of boat by business at wharves..... 230
COURT-HOUSE, Montreal..... 193, 385, 391	DAMAGES, Remote..... 320
COURT OF QUEEN'S BENCH and its sittings, 377 393, 401, 409	Defective sidewalk..... 357
COURT INCIDENTS..... 392	Negligence..... 364
COUTLER, L. W..... 288	Action of, based on previous suit.. 378
CREMATION in England..... 48	Default to give debentures..... 382
CRIME IN IRELAND..... 48	DEATH PENALTY, Mr. Justice Stephen on the 104
CRIME, Mr. Howard Vincent on. 362	DEATH PENALTY..... 113
CRIMES ACT, Ireland, Private inquiries under 56	DECEASED WIFE'S SISTER, marriage with, 209, 232
CRIMINAL LAW AMENDMENTS, Incest bill.... 81	DEFAULT, pupil of Normal School.... 132, 133
CRIMINAL LAW, Proposed changes in the.. 65	Promise of sale..... 138
Selection of jurors..... 86	Contract of a commercial nature.. 201
Consolidation.. 88	Where party owing compliance re- fuses or is unable to comply..... 216
Examination of deceased..... 95	

DEFINITIONS, Amusing.....	88	Privileged statement of agent to principal.....	231
DELAY expiring on Sunday.....	136	Parol to explain writing.....	231
DEMURRAGE, delay at Coal port.....	146	To establish rape, in civil suit.....	270
DESAULNIERS, A. L.	32	Of loan.....	291
DESPATCH of business.....	1	Of error in signing note.....	342
DIRECTORS, (Bank) Liability.....	112	Variation of written contract.....	344
DISTRICT MAGISTRATE, Jurisdiction of.....	211	Sale.....	363
DIRECTOR, When entitled to compensation for services.....	368	Order of endorsements on note.....	397
DIVORCE in Maine.....	24	EXCEPTION <i>à la forme</i>	107
Validity of foreign.....	300	False return.....	359
In Europe.....	320	EXECUTION, Ball dress may be seized.....	37
Foreign.....	329	Description of immovables seized..	134
DIVORCE PROCEEDINGS, Expeditious.....	392	Contempt of Court.....	173
DOGS, A judicial opinion on.....	336	Guardian.....	229
DOMICILE of married woman.....	300	Judgment for aliments.....	325
DOMINION CONTROVERTED ELECTION ACT, 1874, Evidence—Bill of particulars—Corrupt inducement.....	74	EXECUTIONER, Office of.....	328
DONATION.....	107	In France.....	336
DONATION of land for public market.....	348	EXEMPTIONS FROM SEIZURE, Ball dress....	37
DOUBTFUL COMPLIMENT, A.....	231	EXPERTS, Appointment of surveyor.....	154
DROIT CRIMINEL des Arrestations.....	145	EXTRADITION.....	281, 313
ECCLIASTICAL COMMISSION.....	295	Procedure—Evidence.....	261
ECCLIASTICAL DISCIPLINE.....	310	EXTRAJUDICIAL OPINIONS.....	25, 41, 89
ELECTION ACT, Canada, Corrupt inducement—travelling expenses of canvasser	74	FALLIÈRES, M.....	56
ELECTION LAW, Signification of "tenant".	183	FEDERAL AND LOCAL JURISDICTION, 126, 209, ...	211, 214, 336
ELECTION ACT, QUEBEC, Procedure under..	276	The tax on corporations.....	153, 158
Withdrawal of deposit.....	336	FLOWERY JUDGMENTS.....	40
Recount of votes.....	354	FORECLOSURE.....	121
Proof of election.....	414	FOREIGN DIVORCE, Validity of.....	300
Inducement to vote	414, 415	FORGERY of ancient manuscript.....	320
ELECTION LAW in England.....	365	FRANC ET QUITTE, Where clause of, is not contained in deed of sale.....	34
ELECTION TRIALS, Humorous incidents of..	288	FRAUDULENT CLAIM against insurance companies.....	40
ELECTION CASE, Fees of witness.....	300	GAMBLING CONTRACT, speculation on margin	93
EMPLOYER, Liability of.....	44, 181	GARNISHMENT.....	216
ENDORSER.....	204	GOODWILL, Sale of.....	205, 353
ENGLISH AND FRENCH LAWYERS.....	321	GOVERNOR-GENERAL, Term of office.....	120
ENGLISH LAW, Changes in.....	38	Change of.....	340, 346
ESCHEAT.....	233, 244	GOWAN (Judge) Retirement of.....	368
EVIDENCE, Appointment of stenographers..	41	GRANDCHILDREN, use of term in will.....	10
Examination before Justice.....	95	GUARANTEE.....	284, 305
To prove extension of contract of surety.....	106	GUARDIAN, to goods taken in execution....	229
To prove paternity.....	170	HEIRS liable jointly for notarial charges on settlement of succession.....	60
Before commission rogatoire.....	189	HOUSE OF COMMONS, Business of.....	267
Of publication of libel.....	197		
Of condition of sale.....	204		

HOUSE OF LORDS.....	275, 288	On railway coupons.....	220, 385, 388
HUSBAND AND WIFE, contract unauthorized by husband.....	23	As measure of damages.....	382
Liability of wife.....	122	INTERNATIONAL COPYRIGHT.....	289
Wife's rights to alimony.....	241	INTERNATIONAL COURTESY.....	193
Right of married woman over her own house.....	268	INTERNATIONAL LAW.....	16
HYPOTHEC not disclosed in deed of sale, Remedy of purchaser.....	34	IRELAND, Crime in.....	48
Registration.....	54	IRISH LORD CHANCELLORSHIP.....	306
Hypothecary creditor ceding right of preference.....	160	JESSEL, The late Sir George.....	129
HYPOTHECARY ACTION for arrears of interest	23	JUDGE, display of learning by.....	1
Creditor may invoke prescription acquired by debtor as to municipal taxes.....	82	JUDGES, majority of, on losing side.....	17
Followed by personal action ..	107	JUDGMENTS, Prolix.....	15
IMPRISONMENT, Period of	116, 121	Flowery	40
IMPROVEMENTS, Claim for.....	116	How judgments are prepared.....	273
INCREASING BILL.....	81	JUDICIAL CHANGES in England.....	145
INCIDENTAL DEMAND, Service of.....	160	In Montreal.....	241
INDICTMENT, Description of property stolen	231	JUDICIAL ERROR in Austria.....	57
Omission of word "feloniously"....	271	JUDICIAL OPINIONS.....	1, 153, 193
INFANT, custody of.....	115	JUDICIAL REFORM, proceedings of the General Council of the bar.....	5, 9
INSANE, Treatment of the.....	24	JUDICIAL SALARIES.....	169
INSANITY, Dr. Buckham on.....	340	JUDICIAL WORK	121
INSOLVENCY, Voluntary assignment.....	123	JUDICIAL SYSTEMS of England and the United States.....	338
Company ceasing to meet payments	135	JURISDICTION, Federal and Local, 126, 153, ...	158, 209, 211, 214, 336
Proof of.....	195	Cause of action.....	324, 336
Benefit of term.....	398	Of Circuit Court.....	336
INSOLVENT ACT, Judgment confirming dis- charge.....	292	JURORS, Selection of.....	86
Bond of Official Assignee appointed assignee by creditors.....	323	JURY TRIAL, Option of.....	184
Description of claim in statement of affairs.....	357	Motion for judgment on verdict....	340
Failure to keep proper books of account.....	358	JURY, The value of Trial by.....	217
Interest on interest-bearing debt, 171,	358	JURIES AND VERDICTS.....	322
INSOLVENT ESTATES.....	42	KIDNAPPING	88
INSURANCE COMPANIES, singular case of fraud	40	KRING case.....	161
(Mutual) Company.....	85	LABRADOR, Government of Eastern coast..	392
(Life).....	86	LACHAUD, Death of M.....	8
(Fire), Waiver of condition requir- ing notice of other insurance.....	227	LAND ACT in England.....	39
(Accident) Forfeiture.....	368	LANDSDOWNE, The Marquis of.....	340, 346
INTEREST, Hypothecary action for arrears of	23	LARCENY, Articles lost.....	232
On interest-bearing claim against estate of insolvent.....	171, 358	Conversion of horse hired.....	239
On hypothecary claims.....	193	Of water in pipes.....	400
		LAST WORDS.....	394
		LAW COURTS, The new English.....	55
		LAW FACULTIES.....	145
		LAWYERS, English and French.....	321
		LAW'S DELAY, The.....	41
		LAWYER'S LETTER, Fee for writing....	8, 61 73

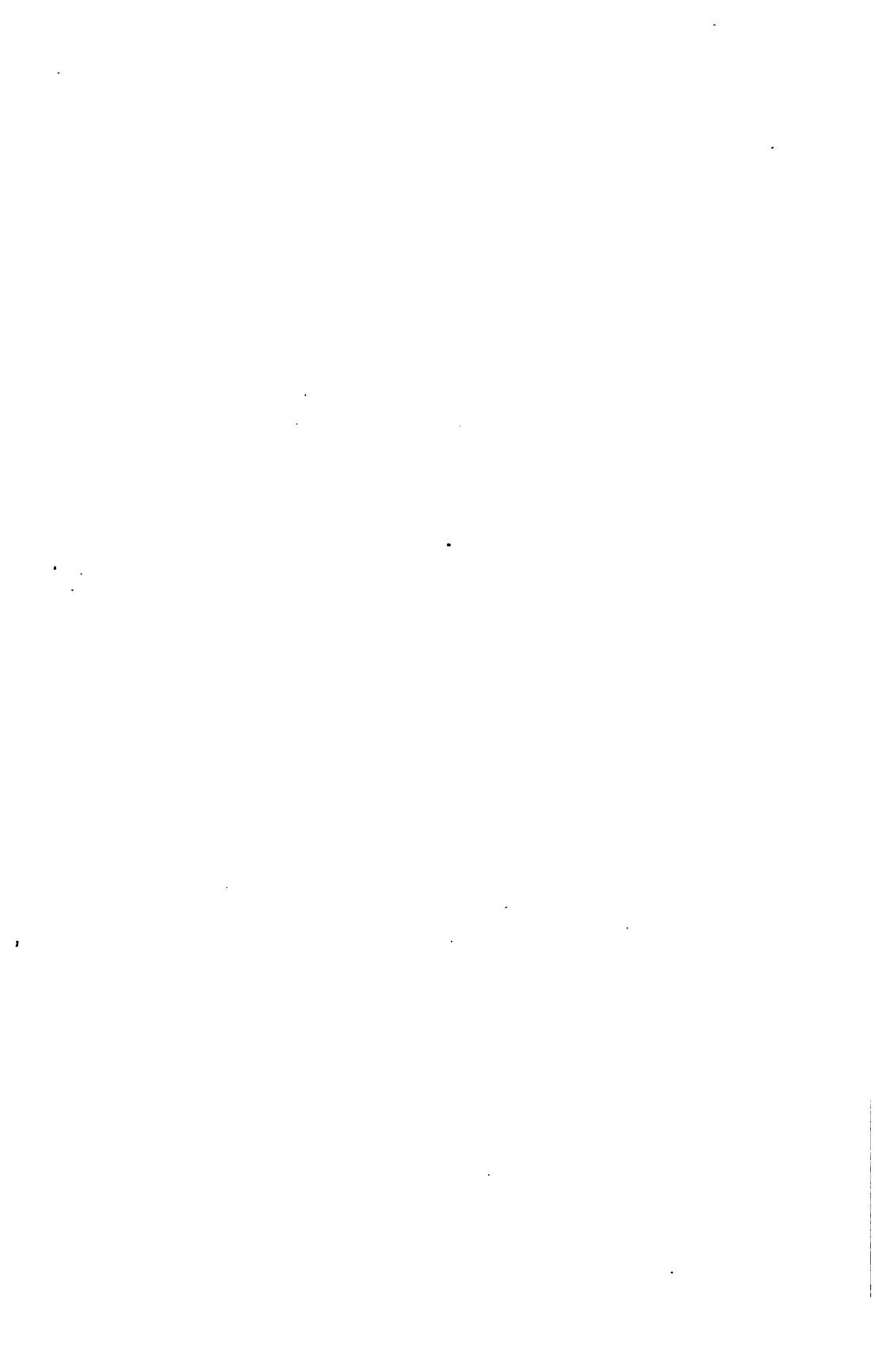
LEASE , Opposition <i>afin de charge</i> founded on rights of lessee.....	12	MARCHANDISE PUBLIQUE , Registration under Art. 981, C.C.P.	37
Resiliation of, in consequence of unsafe condition of premises.....	42	MARRIAGE CONTRACT , registration of, against property acquired subsequently...	54
Saisie arrêt, issued by lessor.....	162	MARRIAGE , With deceased wife's sister.....	209
Apparent defect.....	216	Pregnancy as ground for avoiding..	249
LESSOR AND LESSEE , Hearing of case in Review.....	68	MARRIED WOMAN , contract unauthorized by husband	23
LEGAL REFORMS	392	Cannot contract without authorization, to pay commission on sale of land for her.....	92
LEGISLATION , <i>Ex post facto</i> , law affecting Board of Temporalities.....	27	Liability of.....	122
LEGISLATION in England.....	267	Divorce obtained by wife in foreign country.....	329
Peculiar, in Kansas.....	391	MARRIED WOMAN'S PROPERTY ACT in England	38
LETTER , Fee for writing 8, 61, 73		MARTIN , The late Baron.....	16
LETTERS PATENT , Mining rights.....	402	MASTER AND SERVANT , Liability of employer to workman.....	44
" LE MORT VIVANT ".....	40	Wrongful dismissal.....	105
LIBEL in pleadings.....	155	Employee leaving service without cause	160
Charge of being a freemason.....	156	Responsibility of employer.....	181
Proof of publication.....	197	MEDICINE , Unlawful practice of....	61
Charge of Mr. Justice Baby.....	281	MINING RIGHTS of Crown.....	402
Accidental publication.....	297	MINOR , Custody of.....	115
Defence to action of.....	353	MISUSE OF TITLES 66, 72, 313	
LICENSE ACT , QUEBEC, Bar-keeper holding license without being owner of liquors.....	54	MITOYEN WALL	286
Intoxicating liquors—Imitation of cider.....	150	MONTREAL BOARD OF TRADE on the discharge of Insolvents.....	42
Quebec License Act of 1870 <i>ultra vires</i> in part.....	211	Carter's tariff for city of.....	148
Closing saloons on Sunday a police regulation.....	214	CITY CHARTER , Appointment of new member of Board of Revisors....	53
Revocation of license.....	317	COURT HOUSE 193, 385, 391	
Act of 1878 held constitutional....	336	POLICE FORCE	264
Constitutionality of—Revocation of license.....	395	MUNICIPAL CORPORATION , damages against, for improper removal of name from list of voters.....	23
LICENSE ACT , (Canada).....	197	Responsible for the acts of its officers in making illegal arrest.....	61
LICENSE LAWS OF ENGLAND, A question under	17	Secretary-Treasurer retaining books of.....	81
LIFE INSURANCE , policy issued by company having its head office in New York	86	Slippery sidewalk.....	93
LIQUORS , Intoxicating.....	150	Responsibility for libel in pleading.	155
LITIGATION as a substitute for duelling....	1	Neglect to guard a dangerous part of the highway.....	107
LOAN , Prescription of.....291, 388		Defective sidewalk.....	357
LOCAL COURTS ACT , Ontario.....	56	Negligence of.....	361
LOCATION TICKET , Possession under.....	90	MUNICIPAL INSTITUTIONS	209
LONGUEUIL , Limits of Town of.....	291	MUNICIPAL LAW , Tax imposed by county council.....	119
LORDS , HOUSE OF.....	275	MUNICIPAL TAXES , Prescription.....	82
MACDONOCHIE CASE	265		
MALICIOUS PROSECUTION of suit.....378, 385			
MANDAMUS , Inspection of minute book of compan	83		

MUTUAL ADMIRATION misplaced.....	298	Custody of minor.....	115
MUTUAL BUILDING SOCIETY.....	369	Alimentary allowance to son of age	133
MUTUAL INSURANCE COMPANY, responsibility		Damages occasioned by minor....	216
of insured.....	85	Action for damages.....	276
Action on premium note.....	159	PARLIAMENTS, Duration of.....	208
Liability of members.....	236	PARTNERSHIP, Powers of Partner after disso-	
Insurance Act of 1877.....	390	lution of firm.....	95
NATIONAL DEBT, Redemption of.....	288	PATENT OF INVENTION — Omission to file	
NAVIGATION, Opening of.....	195	model.....	227
NECESSARIES.....	15	PATENT, Infringement of.....	236
NEGLECT by Dentist.....	3	Action to set aside.....	271
Animal killed on railway track, 43,	163	Grant of lands.....	402
Of Employer.....	44	PATERNITY, Proof of.....	170
Collision between vehicles.....	110	PENALTY for unlawful practice of medicine.	61
Discharging water from building on		Exception <i>à la forme</i> to action for...	98
street.....	272	Pupil of Normal School refusing to	
Of municipal corporation.....	361	teach.....	132, 133
Damages.....	364	PEREMPTION, Error in Prothonotary's certifi-	
See MUNICIPAL CORPORATION.		cate.....	68
NEGOTIABLE INSTRUMENT, Acceptance of Bill		Interruption by <i>pour-parlers</i>	162
containing unfilled blanks.....	62	PEREMPTORY CHALLENGE.....	73
See PROMISSORY NOTE; BILL.		PLEADING, Unliquidated damages cannot be	
NESBITT Murder, charge of Mr. Justice Ram-		pleaded in compensation to action	
say.....	100	for goods sold.....	98
NORMAL SCHOOL, Penalty for refusal to		Grounds of demurrer, action for	
teach.....	132, 133	penalty.....	98
NOTICE OF ACTION under C.P. 22.....	276	Action on promissory note.....	316
NOTICE OF CLAIM to goods seized by Customs		POLICE MAGISTRATE, Jurisdiction of.....	395
officers.....	346	POLICE REGULATION.....	214
NUISANCE, right of local legislature to deal		POLLOCK, Baron, at the Thieves' Supper ...	408
with.....	209, 210	POSSESSOR in bad faith, claim for improve-	
Salvation army.....	233	ments.....	116
OATH OF WITNESSES.....	17	POSTAL NOTES in the United States.....	264
OATHS AND AFFIRMATIONS.....	73	PREGNANCY as ground for avoiding marriage	249
OATH, in Portugal.....	88	PREScription, Admission of co-debtor....	60
OATHS, The affirmation bill.....	131, 160, 161	Hypothecary creditor may invoke	
OBLIGATION, Alternative.....	204	prescription acquired by debtor..	82
Interpretation of.....	216	Libel in pleading.....	155
OFFENCES AGAINST THE STATE.....	119	Of loan, note given as acknowledg-	
ONTARIO AND QUEBEC APPEAL COURTS, Pro-		ment.....	291
gress of business.....	402	New promise.....	320
"OPEN and public place".....	264	Claim under Customs laws.....	346
OPPOSITION, Stamping and registration of,	149	By ten years' use of public thorough-	
OVER-LEGISLATION.....	114, 120	fare.....	348
OWNERSHIP, Possession in bad faith.....	116	Loan.....	388
PARDON, Revocation of.....	49	PRIVATE BILLS.....	185
PARENT AND CHILD, Action for alimentary		PRIVATE SEALS.....	328
allowance.....	60, 84	PRIVILEGE on ground of incrimination....	282
		PRIVILEGED CAUSES in appeal.....	18
		PROBABLE CAUSE.....	22

PROCEDURE, Action to set aside letters patent	271	PROFESSIONAL FAME	25
Appeal from judgment which does not dispose of case	155	PROHIBITION, Writ of	317
Appeal by curator	325	PROMISE OF SALE	138
Appeal from order of judge appointing sequestrator	326	PROMISSORY NOTE, Insolvency of maker	135
Application to Q.B. for appointment of <i>séquestre</i>	155	Insufficiency of stamps	129, 136
Contempt	173	Stamps on	169, 175, 185, 209
Contestation of bailiff's return	359	Authority of President to sign	171
Contestation of report of distribution	388	Endorser	204
Costs in Review	336	Successive endorsers	278
Curator to <i>délaissement</i>	336	Given in acknowledgment of loan	291
Debtor failing to file statement under 766 C.C.P.	189	Proof incumbent on person producing	316
Delay—Foreclosure	122	Consideration	320
Delay expiring on Sunday	136	Signed by error	342
Description of immovables seized	134	Order of indorsements	397
Exception to the form	107	Obtained by fraud	413
Failure to put in security for costs	22	PROPERTY, Personal, inadvertently left on premises	231
Grounds for exception to the form	98	PROPRIETOR, Discharging water from building upon street	272
Guardian to goods seized in execution	229	PUBLIC OFFICER, Church constable	276
Hearing in Review of case under lessor and lessee act	68	PROVINCIAL CITIES	368
In extradition cases	261	PROVINCIAL RIGHTS, Lands escheated	244
Interlocutory judgment—Appeal	154	PROVINCIAL TAXATION	153, 158
Interruption of prescription	162	QUEBEC LICENSE LAW, Proceedings under	317
Jurisdiction of Circuit Court	336	QUEEN'S BENCH, Decisions in Appeal in 1882	57
Motion for judgment on verdict of jury	340	QUEEN'S COUNSEL	227, 273
Notice of putting in security in Appeal	325	QUO WARRANTO, to Board of Revisors	53
Notice of claim under Customs laws	346	"R," on Judicial Reform	9
Opposition stamped and enregistered on return day	149	" on <i>Grant v. Beaudry</i>	41
Option of jury trial	184	" on Proposed changes in the criminal law	65, 73
Peremption	68	" on Titles	66
Report of distribution	160	" on The death penalty	113
Requête civile	316	" on Over legislation	114
Resolutions adopted by the General Council of the bar	5, 9	" on The Affirmation Bill	225
Review may be had upon judgment appointing sequestrator	90	" on The Court of Queen's Bench and its sittings	377, 393, 401, 409
Security in appeal, hypothecary action	412	RAILWAY, Evidence of negligence—animal killed on track	43, 163
Service of incidental demand	160	Connecting carriers and their liability	69
Suggestions of M. Pignolet	50	Use of streets	216
Taxation of costs	84	Negligence	368
Under Quebec Controverted Elections' Act	276	Consignment of grain	271
Writ of prohibition	317	Crossing on railway premises	271
		RAILWAY COMMISSIONER, Quebec	222

RAMSAY, Mr. Justice, Remarks on substitution of affirmation for oath.....	73	SEAL, PRIVATE	328
Charge in the case of <i>Reg. v. Milloy</i> 100		SECRETARY-TREASURER of municipality condemned to deliver up books	81
RAPE upon girl above the age of 12 and under 13.....	264	SECRETING, Refusal to deliver according to contract	12
Evidence of, in civil action.....	270	SECURITY for costs, Dismissal of action where not put in.....	22
RECEIVING STOLEN GOODS.....	269	SECURITY IN APPEAL to Q.B., Notice of....	325
RECOUNT OF VOTES.....	354	Hypothecary action	412
REFERREES, Trials by.....	33, 50	SEDUCTION BILL.....	97, 137
REGISTRAR, Claims for furnishing and heating office.....	83	SEQUESTRATOR should not be appointed where one of the parties has title and is in possession.....	90
REGISTRAR'S FEES in New York	265	Review may be had upon judgment appointing	90
REGISTRATION as <i>marchande publique</i>	37	Application to Q. B. to appoint....	155
Of marriage contract against property acquired subsequently....	54	Appeal from order of judge appointing.....	326
RE-INTEGRANDE, When the action lies....	4	SHAKESPEARE AND BACON.....	88
REPORT OF DISTRIBUTION.....	160	SHAREHOLDER, Action to set aside lease by company.....	327
REPORTER'S NAMES, Pronunciation of.....	360	SHARSWOOD, Chief Justice, Farewell address	1
REQUESTS CIVILE.....	316	Death of.....	184
RESCISSION of Transaction, Action for, to be preceded by offer of restitution	292	SIDEWALK, Liability of proprietor for formation of ice on.....	272
RESTRAINT UPON TRADE	289	Notice of defect.....	357
RESOLUTIONS for the New Year	32	SLANDER by remarks of member at club meeting... ..	320
RETROSPECTIVE LEGISLATION	27	STAMP DUTIES on legal proceedings in Manitoba	353
REVENDEICATION	243	SMITH, Sir Albert J.....	232
REVIEW on a question of costs	55	SOCIETY.....	216
Case under procedure governing lessor and lessee cases.....	68	SOLICITORS AND COUNSEL.....	264
May be had upon judgment appointing sequestrator	90	SOLICITOR, Misconduct of.....	272
Costs in.....	336	STAMP (BILL), Cancellation of.....	107
REVISORS, Board of, Montreal—Quo warranto to member of.....	53	STAMPS ON PROMISSORY NOTES..129, 136, 169, ...	175, 185, 209
REVOCATION OF PARDON	49	STATE, Offences against the.....	119
SALE OF IMMOVABLE, Warranty	27	STATUTES, Consolidation of.....	185
Hypothec not disclosed—Remedy of purchaser	34	STEAMBOAT WHARF, Tax on.....	291
Rights of unpaid vendor	19	STENOGRAPHY in the Courts.....	41, 409, 410
Credit given to another.....	203	STEPHEN, (Mr. Justice), CRIMINAL PROCEDURE.....	145
Parol evidence of condition.....	204	History of the Criminal law of England.....	131
Defects in goods sold.....	308	On the death penalty.....	104, 113
Proof of.....	363	On the value of trial by jury.....	217
SALVATION ARMY	233	STRANGE PORTRAIT, A.....	337
SANBORN, Deputy-Sheriff, Decease of.....	66	STRANGE TRANSLATIONS.....	41
SCHOOL COMMISSIONER, Election of	257	STREAMS BILL.....	97
Nomination by Lieutenant-Governor in Council	365	STREET, Prescription.....	349
SCHOOL HOUSES (Public) in the United States.....	56		

SUCCESSION, Acceptance of.....	26	Use of name.....	411
Liability of Universal legatee.....	109	TRANSLATIONS, STRANGE	41
Intestate,.....	233	TRIAL BY JURY, The value of	217
SUNDAY SHAVING.....	288	TRUSTEE, Obligations of.....	416
SUPREME COURT, Appeal from.....	81	TUTOR, Powers of	243
SUPREME COURT AND ITS CHAMPION, THE.....	89	Action for damages to minor must be brought by	276
SUPREME COURT, Bill to restrict the Appel- late jurisdiction of.....	113	UNDUE INFLUENCE	207
Decisions of..... 138, 240,	257	UNPAID VENDOR, Rights of	18, 117
Appeal from, to Privy Council.....	257	USUFRUCTUARY, who has meddled with property of succession	109
SURETY, Proof of extension of contract of.	106	VAGRANCY	269
Guarantee given to Bank afterwards amalgamated with another	284	VENDOR, Rights of unpaid..... 19,	117
Of official assignee appointed as- signee by creditors.....	305, 323	VENTILATION	82
SURVEYOR, Appointment of.....	164	VERDICT, Misspelling	237
TARIFF for carters in city of Montreal....	148	Refusing a	345
TAXATION of steamboat wharf.....	291	VETO-POWER of the Dominion Government	97
TAXES, Prescription.....	82	VINCENT (Mr. Howard) on crime	362
TAYLOR, T. W., appointed judge in Manitoba	24	WAGERING CONTRACT, Implied contract to pay agent authorised to bet is not wagering	177
TELEGRAPH COMPANY, Lease to another com- pany.....	327	WAIVER of condition requiring notice of other insurance.....	277
TELEPHONE, Improper use of.....	105	WALL, mitoyen	286
TEMPERANCE ACT of 1864	211	Party.....	287
TEMPORALITIES, BOARD OF, Retroactive legis- lation	27	WALLBRIDGE, L., appointed Chief-Justice ..	8
TENANT, within meaning of Quebec Election Act.....	183	WARRANTY, Sale of immoveable....	27
TENDER, Before suit to rescind transaction	216	WHICH IS IT?.....	378
TERM, Where maker of note becomes insol- vent.....	135	WHIPPING-POST in Delaware.....	56
Benefit of.....	398	WIFE, Authorization to sue for an account	329
THREATS, Contract extorted by.....	234	See HUSBAND AND WIFE; MARRIED WOMAN.	
TICHBORNE CLAIMANT.....	104	WIFE BEATING	160
TITHES, Responsibility for.....	165	WILL, Exercise of power	10
TITLES, Misuse of,..... 66, 72,	313	Insanity of testator—Error.....	64
TITLE to personal property inadvertently left on premises.....	231	Erasures after execution by testator	318
TOWER OF LONDON	360	Property declared unseizable	371
TRADE MARK, Assumed name of author ...	87	WITNESS, Incompetency of atheists	17
Containing misrepresentation is not protected	253	Privilege on ground of incrimination	282
		Fees of.....	300



Stanford Law Library



3 6105 062 740 738

